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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~1185~~. 771 ~~1194~~ 181

ERWIN DAVIS, APPELLANT,

vs.

ANGELICA WAKELEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 22, 1891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1185.

ERWIN DAVIS, APPELLANT,

vs.

ANGELICA WAKELEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE
versus
ERWIN DAVIS. } No. 4411. In Equity.

To the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

I. Angelica Wakelee, of the city of San Francisco and State of California, and a citizen of the State of California, brings this her bill against Erwin Davis, of the city of New York and State of New York, and a citizen of the State of New York.

II. And thereupon your oratrix complains and says that during the months of August and September, 1869, at the city of San Francisco, California, the defendant, Erwin Davis, made his certain six promissory notes in writing in the word and figures following—that is to say:

"$1,804.65. SAN FRANCISCO, *August 26th*, 1869.

"On the 25th day of September, 1869, at three o'clock p. m.
2 of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, eighteen hundred and four $\frac{65}{100}$ dollars, with interest from date at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

"On the 25th day of October, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

"On the 24th day of November, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

3 "On the 24th day of December, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

"On the 23rd day of January, 1870, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"SAN FRANCISCO, *September 8th*, 1869.

"On demand I promise to pay to H. P. Wakelee or order six thousand and fifty-five $\frac{35}{100}$ dollars in gold coin, with interest from date at the rate of one per cent. a month.

"$6,055.35.

"(Signed) ERWIN DAVIS."

III. And then and there, for value received, said defendant delivered the said promissory notes to Henry P. Wakelee (in said notes called H. P. Wakelee), who thereby became the owner and holder thereof.

4 IV. That thereafter and before the commencement of this suit said Henry P. Wakelee sold and delivered said promissory notes for value to Fielding L. Marshall.

V. That thereafter and before the commencement of this suit said Fielding L. Marshall sold and delivered said promissory notes for value to your oratrix.

VI. That none of said promissory notes nor the interest due thereon have been paid.

VII. That on or about September 11th, 1869, said defendant, Erwin Davis, filed in the United States district court for the district of California, in bankruptcy, his petition to be adjudged a voluntary bankrupt.

VIII. That thereafter, on or about September 30th, 1869, said Erwin Davis was by a decree of said United States district court adjudged a bankrupt.

IX. That the debts existing as aforesaid due by the defendant, Erwin Davis, to said Henry P. Wakelee, as evidenced by and set forth in said promissory notes, were duly proved in said bankruptcy proceedings under said petition in bankruptcy.

X. That said defendant neglected to procure his discharge and to file his petition for such discharge until December 23rd, 1875.

XI. That meantime said Henry P. Wakelee, on the 28th day of June, 1873, filed in said bankruptcy proceedings in said court a petition for leave to sue said bankrupt, the defendant, Erwin Davis, a copy of which petition is hereto annexed marked "Exhibit A" and made a part of this bill.

XII. That thereupon, on the 8th day of July, 1873, said
5 district court entered an order granting said Henry P. Wakelee leave to bring an action upon said promissory notes against said defendant, Erwin Davis, in the terms as set forth in the said order, a copy of which is hereunto annexed and marked "Exhibit B" and made a part of this bill.

XIII. That thereafter, pursuant to said order of leave, said Henry P. Wakelee commenced in July, 1873, an action upon said promissory notes against said defendant, Erwin Davis, in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, by publication of summons under the laws of the State of California and without personal service of summons therein upon said Davis.

XIV. That thereafter, on the 18th day of November, 1873, in said action said Henry P. Wakelee, without personal service of summons upon said Davis, obtained a judgment against said defendant, Erwin Davis, in the said district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco; by the terms of which judgment it was ordered, adjudged, and decreed that said Henry P. Wakelee, the plaintiff in said action, have and recover from said defendant, Erwin Davis, defendant therein, in United States gold coin the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18th, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars.

XV. That thereafter, on or about 23rd December, 1875,
6 said defendant, Erwin Davis, filed in said bankruptcy proceedings in said United States district court a petition for his discharge in bankruptcy.

XVI. That thereupon said Henry P. Wakelee, on or about February 23rd, 1876, filed in said United States district court in said bankruptcy proceedings specifications of opposition to the discharge of said Erwin Davis, the bankrupt, upon the grounds and for the reasons set forth and fully appearing in a copy of said specifications hereto annexed, marked "Exhibit C," and made a part of this bill.

XVII. That on or about March 18th, 1876, said defendant, Erwin Davis, caused to be filed in said bankruptcy proceedings in said United States district court his petition and notice of motion (which petition was signed and sworn to by his attorney thereto duly authorized by said Davis) for an order cancelling said Henry P. Wakelee's proof of debt and dismissing and disregarding the said specifications of opposition filed as aforesaid by said Henry P. Wake-

lee on the grounds alleged in said last-mentioned petition in substance as follows—that is to say: The said Henry P. Wakelee, on or about the 28th day of June, A. D. 1873, and after he had proved up his debt or claim against the said estate of said Erwin Davis, petitioned said United States district court for and on or about the 8th day of July, A. D. 1873, obtained from it, said court, an order granting leave to the said Henry P. Wakelee to commence any action or actions at law or suits in equity against the said Erwin Davis (the defendant herein) as he might be advised in any State or country having jurisdiction of the person or property of the said Erwin Davis, and that thereafter the said Henry P. Wakelee commenced an action in the fifteenth judicial district court in and for the city and county of San Francisco for the same cause of action on
7 which he had proved up his debt in the said bankruptcy proceedings, and that in the due course of the said action the said Henry P. Wakelee obtained a judgment of the said fifteenth judicial district court in his favor and against the said Erwin Davis, and that said judgment still stood of record in said fifteenth — district court and was in full force; all of which will more fully appear by reference to said petition and notice of motion, copies of which are hereto annexed, marked "Exhibits D and E" respectively, and made parts of this bill.

XVIII. That your orator further declares that the debts proved up, the petition, the order, and the judgment set forth and alleged in said petition of said Erwin Davis filed in said United States district court March 18th, 1876, were the debts evidenced by the promissory notes hereinbefore set forth, the order, a copy of which is annexed hereto, marked "Exhibit B," and the judgment of November 18th, 1873, hereinbefore set forth and alleged.

XIX. That said motion coming on to be heard before said court on July 20th, 1876, argument was made by counsel for both your orator and said defendant, Erwin Davis, upon said petition, notice of motion, and specifications of opposition to bankrupt's discharge. And it was then and there claimed, declared, and admitted in open court by counsel for and in behalf of said defendant, said bankrupt, Erwin Davis, that by reason of the facts alleged and recited in said petition and notice of motion filed March 18th, 1876, as aforesaid, the original debts of said Erwin Davis due to said H.
P. Wakelee and proved up in said bankruptcy proceedings
8 had merged in said judgment obtained November 18th, 1873, in the fifteenth judicial district court of the State of California in and for the city and county of San Francisco, and thereby became a new debt created since the adjudication of said Davis as a bankrupt, and that therefore said judgment debt would not be barred or discharged by the discharge in said bankruptcy proceedings of said defendant, the bankrupt, Erwin Davis, but would remain standing of record and valid; and, further, that said Henry P. Wakelee had by reason of such facts no standing in such bankruptcy proceedings, and was not therefore a party competent to oppose the discharge of said Davis, the said bankrupt.

XX. That in the matter of said motion, on or about October 31st,

1876, an order of said United States district court in said bankruptcy proceedings was made by and filed in said court, by which order it was ordered and decreed that all proofs of debt heretofore made and filed in said court by said Henry P. Wakelee against the estate of said Erwin Davis, the bankrupt, be, and were thereby, cancelled, and that the specifications of opposition theretofore filed in said court to the final discharge of Erwin Davis in bankruptcy by said Henry P. Wakelee be, and were thereby, dismissed and set aside and should in all things thereafter be disregarded, of which order a copy is hereto annexed, marked "Exhibit F," and made a part of this bill of complaint.

XXI. That said judgment order made and entered October 31st, 1876, was based upon the allegations contained in said specifications of opposition, and also said petition and notice of motion filed March 18th, 1876, as aforesaid.

And upon the claims, declarations, and admissions of coun-
9 sel for said defendant said bankrupt, Erwin Davis, made in open court, as set forth in paragraph XIX of this bill of complaint, and by reason thereof.

XXII. That said judgment order was accepted by said Davis, and he thereafter obtained his final discharge in bankruptcy.

XXIII. That said Henry P. Wakelee was at the time of making said judgment order the owner of said promissory notes and of said judgment obtained November 18th, 1873.

XXIV. That said Henry P. Wakelee accepted said judgment order made and entered as aforesaid October 31st, 1876, and did not appeal therefrom.

XXV. That the reason said Henry P. Wakelee so accepted said judgment order and did not appeal therefrom was because by the claims, declarations, and admissions of said counsel of said Davis made in open court, as set forth in paragraph XIX of this bill of complaint, and by terms and statements of said petition and notice of motion filed March 18th, 1876, and of said judgment order of October 31st, 1876, the validity and binding force of said judgment of November 18th, 1873, was affirmed, and said Davis was thereby forever estopped from denying the same, notwithstanding his discharge in bankruptcy then petitioned for and subsequently obtained.

XXVI. That neither said Henry P. Wakelee nor any subsequent owner or assignee of said promissory notes ever after October 31st, 1876, made any opposition to said Davis' petition for his discharge in bankruptcy.

XXVII. That thereafter and before the commencement of this suit said Henry P. Wakelee sold and assigned said judgment
10 recovered as aforesaid November 18th, 1873, to Charles E. Laidlaw for value; and thereafter and before the commencement of this suit Charles E. Laidlaw sold and assigned the same to your oratrix, Angelica Wakelee, for value, and your oratrix now is the sole owner thereof.

XXVIII. That said judgment of said district court of the fifteenth judicial district of the State of California recovered by said Henry

P. Wakelee against said defendant, Erwin Davis, November 18th, 1873, is still standing of record in said court and is of full and binding force and validity.

XXIX. That no part thereof has been paid, and the whole amount thereof, to wit, twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars, with interest on twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars thereof at the rate of seven per cent. per annum, and at the rate of six per cent. per annum on forty-nine dollars thereof from November 18th, 1873, remains due, owing, and unpaid to your oratrix from said defendant, Erwin Davis.

Wherefore your oratrix prays judgment against said defendant, Erwin Davis, that he shall pay your oratrix the amount of said judgment of November 18th, 1873, to wit, twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars, with interest on twenty-two thousand seven hundred and sixty $\frac{22}{100}$ dollars thereof at the rate of seven per cent. per annum, and on forty-nine dollars at the rate of six per cent. per annum from November 18th, 1873, together with the costs of this action.

May it please your honors to grant unto your oratrix the writ of subpœna of the circuit court of the United States, to be directed to the said Erwin Davis, thereby commanding him at a certain day, and under a certain penalty, therein to be specified, personally
11 to be and appear before this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet.

And that your oratrix may have such further and other relief in the premises as the nature of her case shall require and to your honors shall seem meet.

ANSON MALTBY,
Solicitor for Angelica Wakelee, Complainant,
48 Wall Street, New York City.

"EXHIBIT A."

In the District Court of the United States for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

To Messrs. Thomson & Wilson, attorneys for the bankrupt Erwin Davis:

You will please take notice that on behalf of H. P. Wakelee, a creditor of said bankrupt, I shall move this honorable court, at the court-room thereof, in the city and county of San Francisco, on Tuesday, the 8th day of July, A. D. 1873, at the opening of
12 the court on that day or as soon thereafter as counsel can be heard, for permission to enforce the collection, payment, and satisfaction of the claims of petitioner (which are fully set out in his petition) by proper and necessary actions and suits at law and in equity in any State or country having jurisdiction of the person and

property of said Erwin Davis and for any other and further relief to which petitioner may be entitled.

The motion will be made upon the annexed petition, of which a correct copy is herewith served on you and upon the files, records, papers, and proceedings in the above-entitled matter.

Dated San Francisco, 28th day of June, 1873.

Yours, etc., WM. H. L. BARNES,
Att'y for Petitioner.

In the District Court of the United States for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

To the Honorable Ogden Hoffman, judge of the said district court of the United States:

The petition of H. P. Wakelee respectfully represents unto your honor as follows, that is to say:

That on or about September 11th, 1869, Erwin Davis, above named, then being a resident of the district of California,
13 filed his petition in bankruptcy in this honorable court, pursuant to the provisions of the act of Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, A. D. 1867, and the acts amendatory thereof and supplementary thereto, praying that he might be adjudged by the court to be a bankrupt within the purview of said act, and that he might be decreed to have a certificate of his discharge from all his debts provable under the same.

That on or about September 30th, 1869, the said Davis was thereupon duly adjudged a bankrupt by Asher B. Bates, Esq., a register in bankruptcy, to whom said petitioner had been referred by said court.

That one William Burling, of said city and county of San Francisco, was, on or about November 17, 1869, duly appointed by said Asher B. Bates, register in bankruptcy as aforesaid, assignee in bankruptcy of the estate of the said Davis; that the said William Burling duly qualified and entered upon the discharge of his duties as such assignee and that he is still acting as such.

That on or about November 19th, 1869, the said register executed an instrument in writing by which he assigned all the estate, real and personal, of the said Davis, with all his deeds, books, and papers relating thereto, to the said William Burling, assignee as aforesaid; that at the time of filing said petition in bankruptcy by the said Davis he was indebted to your petitioner in large sums of money as follows, to wit:

The sum of eighteen hundred and four dollars and sixty-five cents ($1,804\frac{65}{100}$), due on the 25th day of September, 1869, payable in gold coin of the United States, with interest at the rate of one per cent. per month from the 26th day of August, 1869, as evidenced by a certain promissory note made by said Davis and payable
14 to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit A."

Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965), due on the 25th day of October, 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 25th day of October, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit B."

Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965), due on the 24th day of November, 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 24th day of November, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit C."

Also a certain other sum of nineteen hundred and sixty-five dollars, due on the 24th day of December, 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 24th day of December, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed, marked "Exhibit D."

Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965), due on the 23rd day of January, 1870, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 23rd day of January, 1870, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit E."

Also a certain other sum of six thousand and fifty-five dollars and thirty-five cents ($6,055$\frac{35}{100}$), payable on demand in gold coin of the United States, with interest at the rate of one per cent. per month from the 8th day of September, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit F."

That your petitioner made due proof of said debts as required by the act of Congress aforesaid, and duly filed the same in the said proceedings in bankruptcy with the said assignee.

That your petitioner was, on the said 11th day of September, 1869, and ever since has been the owner and holder of said promissory notes and each of them.

Your petitioner has been informed and believes and charges the fact to be that, except a small amount of personalty of but little value surrendered to the said assignee by said Davis, all his property was incumbered by mortgages and liens of various descriptions, amounting to much more than the value of the same; that no part of the estate of said bankrupt which came to the hands of his said assignee has been distributed among or to any of the creditors of the estate whose claims were unsecured (of which claims your petitioner's is one).

That there will be, as your petitioner is informed and believes, and

therefore charges on such information and belief, no assets or other thing from said property to be distributed among such creditors as himself.

That the property of said bankrupt which came to the hands of the said assignee is wholly insufficient to discharge the liens and incumbrances thereon and the costs of the proceedings in bankruptcy, and that your petitioner's claims are wholly due and are unpaid.

That although said Davis was duly adjudged a bankrupt as aforesaid, he has made no application to the court for a dis-
16 charge from his debts, which delay on his part is unreasonable and fraudulent, as well as unnecessary, if ever he intends to apply for a discharge, which he does not intend to do, according to your petitioner's information and belief.

That your petitioner is informed and believes, and therefore charges upon such information and belief, that said Davis fraudulently concealed the account books and memoranda relating to his estate and effects and fraudulently neglected and failed to deliver the same to his said assignee, although often requested by him so to do; that he did not surrender or deliver all of his property to his said assignee, but willfully and fraudulently concealed some portion thereof.

That your petitioner is advised and believes that said Davis could not obtain a final discharge from his debts if he were to apply therefor to this honorable court, by reason of his having committed the fraudulent acts above set forth and many other acts in contravention of the letter and spirit of the act of Congress hereinbefore mentioned.

That your petitioner is informed and believes, and therefore charges the fact to be, that since the filing of his said petition in bankruptcy said Davis has acquired a large amount of property and estate, in the State of New York and elsewhere, of the value of not less than one hundred thousand dollars, which is held by him in his own name and right or by others whose names are unknown to petitioner, but in trust for him; that all or most of said property can be reached by the requisite proceedings and subjected to the payment of your petitioner's just claims and demands.

That your petitioner's claims and demands above mentioned will be barred by the statute of limitations in force in the State of New York, where said Davis is now reputed to reside, unless he shall spe-dily commence proceedings there against said Davis, and
17 he will therefore be unable to enforce the payment thereof in the State of New York or from instituting the proper proceedings to reach the said bankrupt's estate.

Wherefore your petitioner prays that leave may be granted him to enforce the collection, payment, and satisfaction of his said claims and demands, and for such purpose to institute and maintain all requisite and necessary actions and suits at law and equity against the said bankrupt, Erwin Davis, as he may be advised in any court or courts in any State or country having jurisdiction of the person or property of the said Erwin Davis, and for such further and other relief as may be agreeable to equity.

And, as in duty bound, your petitioner will ever pray, etc.

WM. H. L. BARNES,
Attorney for Petitioner.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

H. P. Wakelee, being duly sworn, deposes and says he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

H. P. WAKELEE.

Subscribed and sworn to before me this twenty-eighth day of June, A. D. 1873.

EDW'D B. COTTER,
U. S. Commissioner.

18 "EXHIBIT A."

$1,804.65. SAN FRANCISCO, *Aug't* 26, 1869.

On the 25th day of September, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, eighteen hundred and four $\frac{65}{100}$ dollars, with interest from date at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

19 "EXHIBIT B."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 25th day of October, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

"EXHIBIT C."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 24th day of November, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in like gold coin.

ERWIN DAVIS.

"EXHIBIT D."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 24th day of December, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

"EXHIBIT E."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 23rd day of January, 1870, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

"EXHIBIT F.

SAN FRANCISCO, *Sept.* 8, 1869.

On demand I promise to pay to H. P. Wakelee or order six thousand and fifty-five $\frac{35}{100}$ dollars in gold coin, with interest from date at the rate of one per cent. a month. $6,055.35.

ERWIN DAVIS.

[U. S. Int. Rev. stamps $3.05 cancelled.]

(Endorsed:) Service of the within notice and of copy of affidavit admitted this 28th day of June, A. D. 1873. R. Thompson, att'y for s'd b'k'pt. Filed June 28th, 1873, at 12.15 m. Edw'd B. Cotter, clerk, by A. D. Grimwood, dep. cl'k.

"EXHIBIT B."

In the District Court of the United States for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

In this matter H. P. Wakelee, a creditor of the bankrupt herein, having heretofore filed his petition praying for leave to commence such actions at law and suits in equity as he may be advised against the said bankrupt for the recovery of the claims and demands held by the said creditor against the said bankrupt, and said petition coming on to be heard this day, the said petitioner appearing by his

attorney, W. H. L. Barnes, Esq., and the said bankrupt by his attorney, R. Thompson, Esq.:

Now, on this the 8th day of July, A. D. 1873, after hearing the respective parties, on motion of W. H. L. Barnes, Esq.,

It is ordered that the said H. P. Wakelee have leave, and leave is hereby granted him, to commence any action or actions at law or suits in equity against Erwin Davis, the bankrupt herein, as he may be advised in any court or courts in any State or country having jurisdiction of the person or property of the said Erwin Davis.

OGDEN HOFFMAN,
District Judge.

Dated San Francisco, California, the 8th day of July, A. D. 1873.

22 "EXHIBIT C."

In the District Court of the United States, District of California.

In the Matter of ERWIN DAVIS, Bankrupt.

And now comes H. P. Wakelee and respectfully shows to this honorable court—

1st. That he is a creditor of said Erwin Davis, bankrupt.

2nd. That he has duly proved his claim against the estate of said bankrupt in the manner provided by law.

3rd. That he opposes the petition of said bankrupt from a discharge of the debts and liabilities, and having duly filed his appearance on the return day set by the court for the hearing of said petition for a discharge presents the following grounds and specifications of opposition to the discharge of said bankrupt:

I.

That said bankrupt has concealed his books relating to his estate and effects.

II.

23 That said bankrupt, being a merchant and trader, has not subsequent to the passage of the act of bankruptcy referred to in his said petition kept proper books of account.

III.

That he has procured the assent of G. A. Treadwell, of Wm. J. Bryan, of G. F. Bragg, of Marsh Pillsbury & Co., of J. W. Perkins and W. G. Taylor, of J. W. Perkins, of Wm. Thompson, Jr., of W. G. Taylor, of Williams, Dean & Co., of C. L. Place & Co., of Robert Hannigan, of H. H. Hill, of the London and San Francisco Bank, Limited, a foreign corporation doing business at San Francisco, in the State and district aforesaid; of C. J. Pillsbury, said persons being creditors of said Erwin Davis, bankrupt, and of each and every of them, to his discharge in bankruptcy by pecuniary considerations and obligations.

IV.

That he has influenced the action of the creditors named in specification III and of each of them with reference to his discharge in bankruptcy by pecuniary considerations and obligations.

V.

That said Erwin Davis has been guilty of fraud, contrary to the true intent of the act of Congress referred to in his said petition, in this, in that the said Erwin Davis, having been duly summoned and required to appear for the purposes required by section 26 of said act, did, clandestinely and fraudulently and while said ex-
24 amination was pending and in progress, abscond and depart from this State and district, and said Erwin Davis has ever since remained absent and out of the jurisdiction of this court and of the jurisdiction of the courts of the United States of America.

And this contestant respectfully shows to this honorable court that said Erwin Davis is not entitled to have and receive from this court his discharge in bankruptcy, because said Erwin Davis has not in all things conformed to his duty under said act, in this:

That said Erwin Davis having been adjudged a a bankrupt on his own petition, and having become subject to the orders of this court, said Erwin Davis was duly summoned and required to appear before the register in bankruptcy before whom these proceedings were pending, to be examined on oath upon matters relating to the disposal or condition of his property, and generally for the purposes required by section 26 of said act of Congress; that pending his said examination and during an adjournment of such examination the said Erwin Davis, without leave of court or that of his creditors or of his assignee in bankruptcy or of any other person having authority to grant such leave or consent, withdrew himself from such examination and clandestinely and fraudulently departed from this State and went out of the jurisdiction of this court and departed for Europe, where said Erwin Davis has ever since been.

That by reason thereof said Erwin Davis was not fully examined as required, and by reason of his said absence this opposing creditor has not been able to avail himself of his rights to examine said bankrupt in accordance with the provisions of said section 26 and of the provisions of said bankrupt act.

That such withdrawal occurred in the year 1870, and said Erwin Davis has ever since that time remained absent.

25 Wherefore this contestant prays that the application of said bankrupt for his discharge in bankruptcy be denied.

J. NAPTHALY AND
W. H. L. BARNES,
Att'ys for Contestant.

(Endorsed:) Filed February 23rd, 1876, at 3.15 p. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

"EXHIBIT E."

In the United States District Court, District of California.

In the Matter of ERWIN DAVIS, a Bankrupt.

To H. P. Wakelee, Esq., and J. Naphtaly and W. H. L. Barnes, his attorneys:

You will please take notice that upon behalf of Erwin Davis, the above-named bankrupt, I shall move this honorable court, at the court-room thereof, in the city and county of San Francisco, on Tuesday, the 28th day of March, 1876, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for
26 an order cancelling the proof of debt heretofore made in the above-entitled cause against the estate of the said Erwin Davis by H. P. Wakelee and to dismiss and disregard the specifications of opposition filed by the said H. P. Wakelee to the discharge of the said Erwin Davis in bankruptcy.

The motion will be made upon the annexed petition, of which a correct copy is herewith served upon you, and upon the files, records, papers, and proceedings in the above-entitled matter.

Dated San Francisco, March 17th, 1876.

R. THOMPSON,
Att'y for Petitioner.

"EXHIBIT D."

In the United States District Court, District of California.

In the Matter of ERWIN DAVIS, a Bankrupt. In Bankruptcy.

And now comes Erwin Davis, the above-named bankrupt, by his attorney, R. Thompson, and moves the court for an order cancelling the proof of debt heretofore made in the above-entiled cause against the estate of the said Erwin Davis by Henry P. Wakelee and to dismiss and disregard the specifications of oppositions filed by the said Henry P. Wakelee to the discharge of the said Erwin Davis in bankruptcy on the following grounds—that is to say:
27 The said Henry P. Wakelee, on about the 28th day of June, A. D. 1873, and after he had proved up his debt or claim against the said estate of Erwin Davis, petitioned this court for, and on or about the 8th day of July, A. D. 1873, obtained from this court, an order granting leave to the said Henry P. Wakelee to commence any action or actions at law or suits in equity against the said Erwin Davis, the bankrupt herein, as he may be advised in any State or country having jurisdiction of the person or property of the said Erwin Davis.

That thereafter, to wit, on or about the 19th day of July, A. D. 1873, the said Henry P. Wakelee commenced an action in the fifteenth judicial district court in and for the city and county of San Francisco against the said Erwin Davis for the same cause of

action on which he had proved up his debt in the said bankruptcy proceedings, and in the due course of the said action the said Henry P. Wakelee obtained a judgment of the said fifteenth district court in his favor and against the said Erwin Davis, which said judgment still stands of record in the said fifteenth district and is in full force.

R. THOMPSON,
Att'y for Petitioner.

28 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

R. Thompson, being duly sworn, doth depose and say that he is the attorney for the above-named bankrupt, Erwin Davis; that he had read the foregoing petition and the statement upon which the same is based, and that the facts set forth in said statement are true of his own knowledge.

R. THOMPSON.

Subscribed and sworn to before me this 18th day of March, 1876.
DAVID LYON,
Commissioner U. S. Circuit Court, Dist. of California.

Service of within is hereby admitted March 18th, 1876.
J. NAPHTALY,
W. H. L. BARNES,
Att'y for Contestants.

(Endorsed:) Filed March 18th, 1876, at 11.55 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

29 "EXHIBIT F."

In the United States District Court, District of California.

In the Matter of ERWIN DAVIS, a Bankrupt.

The matter of the motion of Erwin Davis, the above-named bankrupt, for an order cancelling the proof of debt heretofore filed in this court by H. P. Wakelee against the said estate and for an order dismissing and disregarding the specifications of opposition filed by the said Wakelee to the final discharge of the said Davis in bankruptcy coming on regularly to be heard, and it having been argued by the attorneys for the respective parties and duly submitted upon the proofs taken, and it having been duly consider by the court—

It is hereby ordered, adjudged, and decreed that all proofs of debt heretofore made and filed in this court by H. P. Wakelee against the estate of Erwin Davis, a bankrupt, be, and the same are hereby, cancelled; and it is further ordered, adjudged, and decreed that the specifications of opposition heretofore filed in this court to the final discharge of Erwin Davis in bankruptcy by H. P. Wakelee be, and the same are hereby, dismissed and set aside and shall in all things hereafter be disregarded.

OGDEN HOFFMAN,
Dist. Judge.

(Endorsed:) Filed October 31st, 1876, at 11.20 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

30 Circuit Court of the United States for the Southern District of New York.

ANGELICA WAKELEE
vs.
ERWIN DAVIS. } In Equity.

Amendments to Bill of Complaint.

First. Strike out "Exhibit B" as at present annexed to the bill of complaint and instead thereof insert the following:

"EXHIBIT B."

In the District Court of the United States for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

In this matter H. P. Wakelee, a creditor of the bankrupt herein, having heretofore filed his petition praying for leave to commence such actions at law and suits in equity as he may be advised against the said bankrupt for the recovery of the claims and demands held by the said creditor against the said bankrupt, and said petition coming on to be heard this day, the said petitioner appearing
31 by his attorney, W. H. L. Barnes, Esq., and the said bankrupt by his attorney, R. Thompson, Esq.—

Now, on this the 8th day of July, A. D. 1873, after hearing the respective parties, on motion of W. H. L. Barnes, Esq.—

It is ordered that the said H. P. Wakelee have leave, and leave is hereby granted him, to commence any action or actions at law or suits in equity against Erwin Davis, the bankrupt herein, as he may be advised in any court or courts in any State or country having jurisdiction of the person or property of the said Erwin Davis.

Dated San Francisco, California, the 8th day of July, A. D. 1873.

OGDEN HOFFMAN,
District Judge.

Second. Insert at the end of the XIX paragraph the following: "And it was then and there claimed, declared, and admitted in open court by counsel for and in behalf of said defendant, said bankrupt, Erwin Davis, that, by reason of the facts alleged and recited in said petition and notice of motion filed March 18, 1876, as aforesaid, the original debts of said Erwin Davis due to said H. P. Wakelee and proved up in said bankruptcy proceedings had merged in said judgment obtained November 18, 1873, in the fifteenth judicial district court of the State of California in and for the city and county of San Francisco, and thereby became a
32 new debt created since the adjudication of said Davis as a bankrupt, and that therefore said judgment debt would not

be barred or discharged by the discharge in said bankruptcy proceedings of said defendant, the bankrupt, Erwin Davis, but would remain standing of record and valid; and, further, that said Henry P. Wakelee had, by reason of such facts, no standing in such bankruptcy proceedings, and was not, therefore, a party competent to oppose the discharge of said Davis, the said bankrupt."

Third. Insert at the end of paragraph XXI the following:

"And upon the claims, declarations, and admissions of counsel for said defendant, said bankrupt, Erwin Davis, made in open court as set forth in paragraph XIX of this bill of complaint and by reason thereof."

Fourth. Insert in XXV paragraph, after the word "because," the following words:

"By the claims, declarations, and admissions of said counsel of said Davis made in open court as set forth in paragraph XIX of this bill of complaint and."

N. Y., June 27th, 1888.

ANSON MALTBY,
Solicitor and Counsel for Complainant, Angelica Wakelee.

33 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE
against
ERWIN DAVIS. } In Equity.

The Demurrer of Erwin Davis to the Amended Bill of Complaint of Angelica Wakelee, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint, as amended, to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for a cause of demurrer showeth that the said complainant hath not by her said bill made such a case as entitles her in a court of equity to any relief from or against this defendant touching the matters contained in the said bill or any of suc'. matters.

I certify that in my opinion the foregoing demurrer of Erwin Davis, defendant, to the amended bill of complaint of Angelica Wakelee, complainant, is well founded in law and proper to be filed in the above cause.

H. A. ROOT,
Solicitor and Counsel for Defendant, Erwin Davis.

Office & post-office address, 10 Wall street, New York city.

34 UNITED STATES OF AMERICA, } ss.:
Southern District of New York,

Erwin Davis, being duly sworn, doth depose and say that he has read the foregoing demurrer to the amended bill of complaint in

this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

ERWIN DAVIS.

Sworn to before me this 26th day of July, 1888.

THOMAS SPARLING,
Notary Public (338), *N. Y. Co.*

35 United States Circuit Court, Southern District of New York.

ANGELICA WAKELEE
vs.
ERWIN DAVIS.

On demurrer to bill.

This action, commenced upon the equity side of the court, is based upon a judgment recovered in 1873 in a State court of California. The only specific relief demanded is for a money judgment. Briefly, these are the facts: In August and September, 1869, the defendant, Erwin Davis, made six promissory notes, aggregating $15,720, and delivered them for value to Henry P. Wakelee. On the 30th of September, 1869, Davis was adjudicated a bankrupt on his own petition, and Wakelee proved the notes against the estate. On the 28th of June, 1873, Wakelee petitioned for leave to sue Davis upon the notes. The petition was granted, and on the 18th of November, 1873, upon service by publication, judgment was entered against Davis for $22,760. This judgment is now owned by the complainant and is the judgment sued on. In December, 1875, Davis applied for his discharge, and Wakelee filed specifications in opposition, charging Davis with various frauds under the bankrupt act.

36 In March, 1876, Davis moved the court for an order dismissing these specifications on the ground that Wakelee since proving his debt had obtained a judgment thereon by leave of the court, which judgment merged the debt and was still valid and in force, and, having been obtained since the adjudication, would not be affected by the discharge. The motion was granted, and Wakelee's proof of debt was canceled and his specifications dismissed. Wakelee's opposition being removed, Davis obtained his discharge. Wakelee accepted the order dismissing the specifications and did not appeal therefrom because of the statements made on behalf of Davis that the judgment was a valid one and would not be affected by a discharge in bankruptcy. The bill alleges that by reason of these proceedings "the validity and binding force of said judgment of November 18, 1873, was affirmed and said Davis was thereby forever estopped from denying the same, notwithstanding his discharge in bankruptcy then petitioned for and subsequently obtained." Prior to the commencement of this suit the judgment was duly assigned to the complainant, no part thereof having been paid. There is no averment that the defendant has taken or threatens to take any proceeding prejudicial to the complainant's rights or that the bill is filed in aid of another action.

The relief demanded is, first, that the defendant pay the amount of the judgment, namely, $22,809, with interest and the costs of this action; second, for such other and further relief as to the court shall seem meet.

37 The defendant demurs on the ground that the bill does not state a cause of action in equity. In her brief the complainant requests, in case the demurrer is sustained, that she may be allowed to amend.

Anson Maltby for the complainant.

Henry A. Root and Thaddeus D. Kenneson (Joseph H. Choate with them on the brief) for the defendant.

COXE, *J.*:

To the opinion expressed at the argument but little need be added, as I am unable to see, after reading the elaborate briefs presented, that the status of the cause is materially altered. It will be seen that the action is upon a judgment, pure and simple—a judgment obtained upon promissory notes in a common-law court of California. No injunction or accounting or discovery is asked. The complainant does not seek a specific performance or to set aside the discharge or any of the proceedings in bankruptcy upon the ground of fraud, accident, or mistake. None of the elements of equitable cognizance are here present. The demand is precisely what it would be were the action at law, namely, for $22,809, with interest and costs. Assuming that no defense were interposed and that a decree could be entered in such an action, it would be for this sum only, and execution would issue immediately to collect it.

38 It appears from the bill that the defendant has obtained a discharge in bankruptcy, and at one time, and while the petition for the discharge was pending, his counsel, in open court, took the position that the judgment "still stood of record and was of full force," and therefore that Wakelee was not in a position to oppose the discharge. Although the counsel for Wakelee apparently contended for the contrary of this proposition, its soundness so impressed itself upon the court that Wakelee's proof of debt was canceled and his specifications in opposition to the discharge were dismissed. It would seem, although she does not say so in the bill, that the complainant is apprehensive lest the mind of the defendant may have undergone a change upon this subject. It is quite evident that she believes that he intends to attack the judgment because the summons was not personally served, and that he expects to rely on his discharge as a defense. She seeks, therefore, to anticipate these objections by alleging that the defendant is estopped from raising them because of the proceedings in the bankruptcy court.

An action upon an outlawed promissory note is not an equitable action, because the defendant has promised not to plead the statute of limitations. An action upon a common-law judgment is not a chancery action, because the defendant is not in a position to attack it or plead a discharge in bankruptcy as a defense. It is, generally,

the cause of action and not the defense which determines the
39 character of the suit, and it is not easy to see why the situation is altered by allegations ancillary to and in aid of the principal cause of action.

It is unnecessary now to decide whether the occurrences in the bankruptcy court do or do not amount to an estoppel, for the reason that even if they do the bill does not state a cause of action in equity. For aught that appears, the defendant may now entertain the same view of the law that his counsel successfully maintained in 1876; he may still think that the judgment is of binding force. Since then he has made no sign. No suit at law has been commenced against him. He has instituted no attack upon the complainant's judgment; he has interposed no defense; he has not even threatened so to do; he may not attack the judgment or rely upon his discharge; he may plead payment, want of title, or other defenses; he may not answer at all. I am unable to discover any theory upon which the complainant can invoke the aid of a court of equity upon the bill in its present form. The action is an action at law. It is no more a chancery suit than it was in California. Its character is not changed by anything alleged in the bill.

The demurrer is allowed. The complainant, if she is so advised, may amend within twenty days.

40 At a stated term of the circuit court of the United States for the southern district of New York, held at the post-office building, in the city of New York, on the 28th day of January, 1889.

Present: Hon. Alfred C. Coxe, judge.

ANGELICA WAKELEE
against
ERWIN DAVIS. } In Equity.

The bill of complaint in this action having been filed on the 13th day of April, 1888, and a demurrer to said bill having been filed on June 4th, 1888, and thereafter and on June 27th, 1888, pursuant to an order of this court, amendments to said bill of complaint having been filed, and a demurrer to the bill of complaint as so amended having been filed on August 6th, 1888, and thereafter and on the 23rd day of October, 1888, said demurrer to said bill of complaint as so amended having come on to be heard at a stated term of this court, held in the post-office building, in the city of New York, before Hon. Alfred C. Coxe, and Thaddeus D. Kenneson, as
41 counsel for defendant, Erwin Davis, having been heard in support of said demurrer, and Anson Maltby, of counsel for complainant, in opposition thereto:

Now, on motion of Henry A. Root, solicitor for the defendant, Erwin Davis, it is—

Ordered that the demurrer herein to said amended bill of complaint be, and it hereby is, allowed with costs to the defendant as against the complainant.

And it is further ordered that the complainant herein, if so advised, may amend her bill of complaint herein within twenty days after the entry of this order and service of a copy thereof upon the solicitor for the complainant.

And it is further ordered, adjudged, and decreed that in case said complainant shall fail so to amend her bill of complaint within said twenty days that the defendant, Erwin Davis, have judgment absolute dismissing the bill of complaint herein with costs.

ALFRED C. COXE.

42 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE, *versus* ERWIN DAVIS. } No. 4411. In Equity.

To the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

I. Angelica Wakelee, of the city of San Francisco and State of California and a citizen of the State of California brings this her bill against Erwin Davis, of the city of New York and State of New York and a citizen of the State of New York.

II. And thereupon your oratrix complains and says that during the months of August and September, 1869, at the city of San Francisco, California, the defendant, Erwin Davis, made his certain six promissory notes in writing in the words and figures following—that is to say:

"$1,804.65. SAN FRANCISCO, *August 26th*, 1869.

"On the 25th day of September, 1869, at three o'clock p.
43 m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, eighteen hundred and four $\frac{65}{100}$ dollars, with interest from date at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

"On the 25th day of October, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

"On the 24th day of November, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Govern-

ment of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

"On the 24th day of December, 1869, at three o'clock
44 p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

"$1,965. SAN FRANCISCO, *August 26th*, 1869.

"On the 23rd day of January, 1870, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

SAN FRANCISCO, *September 8th*, 1869.

"On demand I promise to pay to H. P. Wakelee or order six thousand and fifty-five $\frac{35}{100}$ dollars in gold coin, with interest from date at the rate of one per cent. a month.

"$6,055.35.

"(Signed) ERWIN DAVIS."

III. And then and there for value received said defendant delivered the said promissory notes to Henry P. Wakelee (in said notes called H. P. Wakelee), who thereby became the owner and holder thereof.

IV. That thereafter and before the commencement of this
45 suit said Henry P. Wakelee sold and delivered said promissory notes for value to Fielding L. Marshall.

V. That thereafter and before the commencement of this suit said Fielding L. Marshall sold and delivered said promissory notes, for value, to your oratrix.

VI. That none of said promissory notes nor the interest due thereon have been paid.

VII. That on or about September 11th, 1869, said defendant, Erwin Davis, filed in the United States district court for the district of California, in bankruptcy, his petition to be adjudged a voluntary bankrupt.

VIII. That thereafter, on or about September 30th, 1869, said

Erwin Davis was by a decree of said United States district court adjudged a bankrupt.

IX. That the debts existing as aforesaid, due by the defendant, Erwin Davis, to said Henry P. Wakelee, as evidenced by and set forth in said promissory notes, were duly proved in said bankruptcy proceedings under said petition in bankruptcy.

X. That said defendant neglected to procure his discharge and to file his petition for such discharge until December 23rd, 1875.

XI. That meantime said Henry P. Wakelee, on the 28th day of June, 1873, filed in said bankruptcy proceedings in said court a petition for leave to sue said bankrupt, the defendant, Erwin Davis, a copy of which petition is hereto annexed, marked "Exhibit A," and made a part of this bill.

XII. That thereupon on the 8th day of July, 1873, said dis-
46 trict court entered an order granting said Henry P. Wakelee leave to bring an action upon said promissory notes against said defendant, Erwin Davis, in the terms as set forth in the said order, a copy of which is hereunto annexed and marked "Exhibit B" and made a part of this bill.

XIII. That thereafter, pursuant to said order of leave, said Henry P. Wakelee commenced, in July, 1873, an action upon said promissory notes against said defendant, Erwin Davis, in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, by publication of summons under the laws of the State of California and without personal service of summons therein upon said Davis.

XIV. That thereafter, on the 18th day of November, 1873, in said action, said Henry P. Wakelee, without personal service of summons upon said Davis and without the appearance in said action of said Davis by attorney or in person, and without his answering or demurring to the complaint therein and without any proceedings by attachment or *in rem* therein, obtained a judgment against said defendant, Erwin Davis, in the said district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco; by the terms of which judgment it was ordered, adjudged, and decreed that said Henry P. Wakelee, the plaintiff in said action, have and recover from said defendant, Erwin Davis, defendant therein, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18th, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars.

XV. That thereafter, on or about 23rd December, 1875, said
47 defendant, Erwin Davis, filed in said bankruptcy proceedings in said United States district court a petition for his discharge in bankruptcy.

XVI. That thereupon said Henry P. Wakelee, on or about February 23rd, 1876, filed in said United States district court in said bankruptcy proceedings specifications of opposition to the discharge

of said Erwin Davis, the bankrupt, upon the grounds and for the reasons set forth and fully appearing in a copy of said specifications hereto annexed, marked "Exhibit C," and made a part of this bill.

XVII. That on or about March 18th, 1876, said defendant, Erwin Davis, caused to be filed in said bankruptcy proceedings in said United States district court his petition and notice of motion (which petition was signed and sworn to by his attorney thereto, duly authorized by said Davis) for an order cancelling said Henry P. Wakelee's proof of debt and dismissing and disregarding the said specifications of opposition filed as aforesaid by said Henry P. Wakelee on the grounds alleged in said last mentioned petition in substance as follows, that is to say: The said Henry P. Wakelee on or about the 28th day of June, A. D. 1873, and after he had proved up his debt or claim against the said estate of said Erwin Davis, petitioned said United States district court for and on or about the 8th day of July, A. D. 1873, obtained from it, said court, an order granting leave to the said Henry P. Wakelee to commence any action or actions at law or suits in equity against the said Erwin Davis (the defendant herein) as he might be advised in any State or country having jurisdiction of the person or property of the said Erwin Davis; and that thereafter the said Henry P. Wakelee commenced an action in the fifteenth judicial district court in and for the city and county of San Francisco for the same
48 cause of action on which he had proved up his debt in the said bankruptcy proceedings, and that in the due course of the said action the said Henry P. Wakelee obtained a judgment of the said fifteenth judicial district court in his favor and against the said Erwin Davis, and that said judgment still stood of record in said fifteenth district court and was in full force; all of which will more fully appear by reference to said petition and notice of motion, copies of which are hereto annexed, marked "Exhibits D and E," respectively, and made parts of this bill.

XVIII. That your orator further declares that the debts proved up, the petition, the order, and the judgment set forth and alleged in said petition of said Erwin Davis, filed in said United States district court March 18th, 1876, were the debts evidenced by the promissory notes hereinbefore set forth, the order, a copy of which is annexed hereto, marked "Exhibit B," and the judgment of November 18th, 1873, hereinbefore set forth and alleged.

XIX. That said motion coming on to be heard before said court on July 20th, 1876, argument was made by counsel for both your orator and said defendant, Erwin Davis, upon said petition, notice of motion, and specifications of opposition to bankrupts' discharge.

And it was then and there claimed, declared, and admitted and assurance was made in open court by counsel duly authorized thereto for and in behalf of said defendant, said bankrupt, Erwin Davis, that by reason of the facts alleged and recited in said petition and notice of motion filed March 18th, 1876, as aforesaid, the original debts of said Erwin Davis due to said H. P. Wakelee and proved up in said bankruptcy proceeding had merged in said
49 judgment obtained November 18th, 1873, in the fifteenth ju-

dicial district court of the State of California in and for the city and county of San Francisco, and thereby became a new debt, created since the adjudication of said Davis as a bankrupt; that said judgment was subsisting, valid, and enforceable, and that said judgment debt would not be barred or discharged or in anywise affected by the discharge in said bankruptcy proceedings of said defendant, the bankrupt, Erwin Davis, but would remain standing of record and valid; and, further, that said Henry P. Wakelee had by reason of such facts no standing and was not interested in such bankruptcy proceedings, and was not therefore a party competent to oppose the discharge of said Davis, the said bankrupt.

XX. That in the matter of said motion, on or about October 31st, 1876, an order of said United States district court in said bankruptcy proceedings was made by and filed in said court, by which order it was ordered and decreed that all proofs of debt heretofore made and filed in said court by said Henry P. Wakelee against the estate of said Erwin Davis, the bankrupt, be, and were thereby, cancelled, and that the specifications of opposition theretofore filed in said court to the final discharge of Erwin Davis in bankruptcy by said Henry P. Wakelee be, and were thereby, dismissed and set aside and should in all things thereafter be disregarded, of which order a copy is hereto annexed, marked "Exhibit F," and made a part of this bill of complaint.

XXI. That said judgment order made and entered October 31st, 1876, was based upon and made by reason of the allegations contained in said specifications of opposition, and also said petition and notice of motion filed March 18th, 1876, as aforesaid, and based upon and made by reason of the claims, declarations, and admissions, assurances, and representations of counsel for said defendant, said bankrupt, Erwin Davis, made in open court, as set
50 forth in paragraph XIX of this bill of complaint, and by reason thereof.

XXII. That said Henry P. Wakelee relied upon, believed, and accepted as true and binding said claims, admissions, declarations, assurances, representations, and allegations of said Davis and of his said attorneys and counsel; that said judgment was valid and binding on him, the said Davis, and that the same would not and should not be barred or in anywise affected by any discharge in bankruptcy of said Davis in said bankruptcy proceedings; and said Wakelee was thereby induced to believe and accept, and did believe and accept, as binding and correct in law the said decision and order of the said U. S. district court made at the instance and on the motion of said Davis, and by reason of said admissions, declarations, assurances, allegations, and representations was induced to accept and did accept said order and did not appeal therefrom.

XXIII. That said order was accepted by said Davis, and he thereafter obtained his final discharge in bankruptcy in said proceedings.

XXIV. That said Henry P. Wakelee was at the time of making said judgment order the owner of said promissory notes and of said judgment obtained November 18th, 1873.

XXV. That neither said Henry P. Wakelee nor any subsequent owner or assignee of said promissory notes ever after October 31st, 1876, made any opposition to said Davis' petition for his discharge in bankruptcy.

XXVI. That thereafter and before the commencement of this suit said Henry P. Wakelee sold and assigned said judgment recovered as aforesaid November 18th, 1873, to Charles E. Laidlaw for value, and thereafter and before the commencement of this
51 suit Charles E. Laidlaw sold and assigned the same to your oratrix, Angelica Wakelee, for value, and your oratrix now is the sole owner thereof.

XXVII. That said judgment of said district court of the fifteenth judicial district of the State of California recovered by said Henry P. Wakelee against said defendant, Erwin Davis, November 18th, 1873, is still standing of record in said court, and is in equity of full and binding force and validity by reason of the facts herein alleged.

XXVIII. That no part thereof has been paid, and the whole amount thereof, to wit, twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars, with interest on twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars thereof at the rate of seven per cent. per annum, and at the rate of six per cent. per annum on forty-nine dollars thereof from November 18th, 1873, remains due, owing, and unpaid to your oratrix from said defendant, Erwin Davis.

XXIX. That your oratrix claims and insists that by reason of all the facts, proceedings, and of the claims, declarations, and admissions, assurances, representations, and allegations of said Davis and of his said attorneys and counsel and the various orders and judgments hereinbefore set forth and upon all the premises defendant Davis is forever estopped from setting up against your oratrix by answer, demurrer, bill of complaint, or otherwise in any future action at law or suit in equity or in any proceeding whatever upon or concerning said judgment of November 18th, 1873; that the debts proved up in bankruptcy as aforesaid by said H. P. Wakelee were not merged in the said judgment entered in his favor against the bankrupt, Erwin Davis, as aforesaid, November 18th, 1873; that said judgment is not valid and does not still stand of record in said district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco and
52 is not in full force; that said judgment does not constitute a new debt which is unaffected by said Davis' said final discharge in bankruptcy, and that such discharge is a bar to any such suit, action, or proceeding upon said judgment.

XXX. That heretofore in various jurisdictions and courts in sundry actions, suits, and proceedings which were instituted upon said judgment between said Davis and the then owner of said judgment and which were heretofore discontinued or terminated without prejudice to your oratrix, said defendant Davis has claimed and set up and still claims and sets up that said judgment of November 18th, 1873, is void because of the lack of jurisdiction of the court wherein it was entered, for the reason that said Davis was not personally served with process, did not appear in the action in any

manner, and that the action was not *in rem.* or commenced by attachment, and, further, that he has obtained a discharge in said bankruptcy proceedings which forever bars all recovery upon such judgment, and such discontinuances were had because said Davis so claimed and set up.

XXXI. That said Davis has frequently threatened and still threatens and your oratrix has reason to believe will endeavor to defeat recovery upon said judgment in any action or suit or proceeding that may be brought thereon by your oratrix by setting up that said judgment is void because of said lack of jurisdiction and that said discharge in bankruptcy forever bars all suits, actions, and proceedings upon said judgment.

XXXII. That your oratrix is about to commence an action at law upon said judgment of November 18th, 1873, against said Davis to recover the amount due thereon as aforesaid in the State of New York, which is the State wherein said Davis resides.

53 XXXIII. That, as your oratrix is advised and believes, under the law of the State of New York, where said action is to be brought, in an action at law to recover the amount due upon said judgment the facts subsequent to said judgment as hereinbefore set forth and constituting the estoppels, as herein claimed and insisted upon, may not be pleaded in the plaintiff's complaint as or in aid of a cause of action, but that such action must be brought upon such judgment alone, and that by the law of the said State of New York it is necessary in an action at law upon such judgment to allege in the complaint either the facts showing the jurisdiction of the court in which the judgment was entered or that the judgment was duly entered, and that unless this be done the complaint would be dismised on demurrer; that your oratrix is unable truthfully to allege in such complaint such jurisdictional facts or that such judgment has duly entered, and that your oratrix is thus remediless in an action at law to maintain her rights under said judgment and under the facts hereinbefore set forth.

XXXIV. All of which actings, doings, and pretenses on the part of defendant since October 31st, 1876, are contrary to equity and good conscience and tend to the manifest wrong and injury of your oratrix in the premises.

In consideration whereof and forasmuch as your oratrix can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, therefore your oratrix prays that said defendant, Erwin Davis, may be adjudged to be forever estopped from claiming, alleging, or setting up against your oratrix by answer, demurrer, bill of complaint, or otherwise in any action at law or suit in equity or in any proceeding whatever upon or concerning said judgment of Nov. 18th, 1873; that the debts proved up in bankruptcy as aforesaid by

54 the said H. P. Wakelee were not merged in the said judgment entered in his favor against the bankrupt, Erwin Davis, as aforesaid, November 18th, 1873; that said judgment is not valid and does not still stand of record in said district court of the fifteenth judicial district of the State of California in and for the city

and county of San Francisco, and is not in full force; that said judgment does not constitute a new debt, which is unaffected by said Davis' said final discharge in bankruptcy, and that such discharge is a bar to any suit, action, or proceeding upon said judgment.

And as it may please your honors to grant unto your oratrix the writ of injunction issuing out of and under the seal of this honorable court, or issued by one of your honors according to the forms of the statute in such case made and provided, perpetually enjoining and restraining the said defendant from asserting, claiming, or alleging against your oratrix by answer, demurrer, or otherwise in any action, suit, or other proceeding whatever upon or concerning said judgment of Nov. 18th, 1873; that the debts proved up in bankruptcy as aforesaid by said H. P. Wakelee were not merged in the said judgment entered in his favor against the bankrupt, Erwin Davis, as aforesaid, November 18th, 1873; that said judgment is not valid and does not still stand of record in said court; that said judgment does not constitute a new debt, which is unaffected by said Davis' said final discharge in bankruptcy, and that such discharge is a bar to any suit, action, or proceeding upon said judgment; and in particular enjoining and restraining said defendants from using in support of his claim and defense in any such action, suit, or proceeding his said discharge in bankruptcy.

And may it please your honors to grant to your oratrix a provisional or preliminary injunction issuing out of and under the seal of this honorable court enjoining and restraining the
55 & 56 said defendant from asserting, claiming, or alleging against your oratrix by answer, demurrer, or otherwise in any action, suit, or other proceeding whatever upon or concerning said judgment of Nov. 18th, 1873, to the same tenor and effect hereinbefore prayed for in regard to said perpetual injunction.

May it please your honors to grant unto your oratrix the writ of subpœna of the circuit court of the United States, to be directed to the said Erwin Davis, thereby commanding him at a certain day and under a certain penalty, therein to be specified, person-
57 ally to be and appear before this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet.

And that your oratrix may have such further and other relief in the premises as the nature of her case shall require and to your honors shall seem meet.

ANSON MALTBY,
Counsel and Solicitor for Angelica Wakelee, Complainant,
48 Wall Street, New York City.

"EXHIBIT A."

In the District Court of the United States for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

To Messrs. Thomson & Wilson, attorneys for the bankrupt, Erwin Davis:

You will please take notice that on behalf of H. P. Wakelee, a creditor of said bankrupt, I shall move this honorable court, at the court-room thereof, in the city and county of San Francisco, on Tuesday, the 8th day of July, A. D. 1873, at the opening of
58 the court on that day, or as soon thereafter as counsel can be heard, for permission to enforce the collection, payment, and satisfaction of the claims of petitioner (which are fully set out in his petition) by proper and necessary actions and suits at law and in equity in any State or country having jurisdiction of the person and property of said Erwin Davis, and for any other and further relief to which petitioner may be entitled.

The motion will be made upon the annexed petition, of which a correct copy is herewith served on you, and upon the files, records, papers, and proceedings in the above-entitled matter.

Dated San Francisco, 28th day of June, 1873.

Yours, etc., WM. H. L. BARNES,
Att'y for Petitioner.

In the District Court of the United States for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

To the Honorable Ogden Hoffman, judge of the said district court of the United States:

The petition of H. P. Wakelee respectfully represents unto your honor as follows—that is to say:

That on or about September 11th, 1869, Erwin Davis above named, then being a resident of the district of California,
59 filed his petition in bankruptcy in this honorable court, pursuant to the provisions of the act of Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, A. D. 1867, and the acts amendatory thereof and supplementary thereto, praying that he might be adjudged by the court to be a bankrupt within the purview of said act, and that he might be decreed to have a certificate of his discharge from all his debts provable under the same.

That on or about September 30th, 1869, the said Davis was thereupon duly adjudged a bankrupt by Asher B. Bates, Esq., a register in bankruptcy, to whom said petitioner had been referred by said court.

That one William Burling, of said city and county of San Francisco, was, on or about November 17, 1869, duly appointed by said Asher B. Bates, register in bankruptcy as aforesaid, assignee in bankruptcy of the estate of the said Davis; that the said William Burling duly qualified and entered upon the discharge of his duties as such assignee, and that he is still acting as such.

That on or about November 19th, 1869, the said register executed an instrument in writing, by which he assigned all the estate, real and personal, of the said Davis, with all his deeds, books, and papers relating thereto, to the said William Burling, assignee as aforesaid; that at the time of filing said petition in bankruptcy by the said Davis he was indebted to your petitioner in large sums of money as follows, to wit:

The sum of eighteen hundred and four dollars and sixty-five cents ($1,804.65), due on the 25th day of September, 1869, payable in gold coin of the United States, with interest at the rate of one per cent. per month from the 26th day of August, 1869, as evidenced by a certain promissory note made by said Davis and payable
60 to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit A"; also a certain other sum of nineteen hundred and sixty-five dollars ($1,965), due on the 25th day of October, 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 25th day of October, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit B."

Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965), due on the 24th day of November, 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 24th day of November, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit C."

Also a certain other sum of nineteen hundred and sixty-five dollars, due on the 24th day of December, 1869, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 24th day of December, 1869, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed, marked "Exhibit D."

Also a certain other sum of nineteen hundred and sixty-five dollars ($1,965), due on the 23rd day of January, 1870, payable in gold coin of the United States, with interest at the rate of ten per cent. per annum from the 23rd day of January, 1870, as evidenced by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit E."

Also a certain other sum of six thousand and fifty-five dollars and thirty-five cents ($6,055.35), payable on demand in gold coin
61 of the United States, with interest at the rate of one per cent. per month from the 8th day of September, 1869, as evidenced

by a certain promissory note made by said Davis and payable to your petitioner or order, a true copy of which is hereto annexed and marked "Exhibit F."

That your petitioner made due proof of said debts as required by the act of Congress aforesaid and duly filed the same in the said proceedings in bankruptcy with the said assignee.

That your petitioner was on the said 11th day of September, 1869, and ever since has been the owner and holder of said promissory notes and each of them.

Your petitioner has been informed and believes and charges the fact to be that, except a small amount of personalty of but little value, surrendered to the said assignee by said Davis, all his property was incumbered by mortgages and liens of various descriptions, amounting to much more than the value of the same: that no part of the estate of said bankrupt which came to the hands of his said assignee has been distributed among or to any of the creditors of the estate whose claims were unsecured (of which claims your petitioner's is one).

That there will be, as your petitioner is informed and believes and therefore charges on such information and belief, no assets or other thing from said property to be distributed among such creditors as himself.

That the property of said bankrupt which came to the hands of the said assignee is wholly insufficient to discharge the liens and incumbrances thereon and the costs of the proceedings in bankruptcy, and that your petitioner's claims are wholly due and are unpaid.

That, although said Davis was duly adjudged a bankrupt as aforesaid, he has made no application to the court for a dis-
62 charge from his debts, which delay on his part is unreasonable and fraudulent, as well as unnecessary, if ever he intends to apply for a discharge, which he does not intend to do, according to your petitioner's information and belief.

That your petitioner is informed and believes, and therefore charges upon such information and belief, that said Davis fraudulently concealed the account books and memoranda relating to his estate and effects, and fraudulently neglected and failed to deliver the same to his said assignee, although often requested by him so to do; that he did not surrender or deliver all of his property to his said assignee, but wilfully and fraudulently concealed some portion thereof.

That your petitioner is advised and believes that said Davis could not obtain a final discharge from his debts if he were to apply therefor to this honorable court, by reason of his having committed the fraudulent acts above set forth and many other acts in contravention of the letter and spirit of the act of Congress hereinbefore mentioned.

That your petitioner is informed and believes, and therefore charges the fact to be, that since the filing of his said petition in bankruptcy said Davis has acquired a large amount of property and estate in the State of New York and elsewhere, of the value of not less than one hundred thousand dollars, which is held by him in

his own name and right or by others whose names are unknown to petitioner, but in trust for him; that all or most of said property can be reached by the requisite proceedings and subjected to the payment of your petitioner's just claims and demands.

That your petitioner's claims and demands above mentioned will be barred by the statute of limitations in force in the State of New York, where said Davis is now reputed to reside, unless he shall speedily commence proceedings there against said Davis, and
63 he will therefore be unable to enforce the payment thereof in the State of New York, or from instituting the proper proceedings to reach the said bankrupt's estate.

Wherefore your petitioner prays that leave may be granted him to enforce the collection, payment, and satisfaction of his said claims and demands, and for such purpose to institute and maintain all requisite and necessary actions and suits at law and equity against the said bankrupt, Erwin Davis, as he may be advised, in any court or courts in any State or country having jurisdiction of the person or property of the said Erwin Davis, and for such further and other relief as may be agreeable to equity.

And, as in duty bound, your petitioner will ever pray, etc.

WM. H. L. BARNES,
Attorney for Petitioner.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

H. P. Wakelee, being duly sworn, deposes and says he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

H. P. WAKELEE.

Subscribed and sworn to before me this twenty-eighth day of June, A. D. 1873.

EDW'D B. COTTER,
U. S. Commissioner.

64 "EXHIBIT A."

$1,804.65. SAN FRANCISCO, *Aug.* 26, 1869.

On the 25th day of September, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, eighteen hundred and four $\frac{65}{100}$ dollars, with interest from date, at the rate of one per cent. per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

"EXHIBIT B."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 25th day of October, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due, at the rate of — per cent. per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

"EXHIBIT C."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 24th day of November, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Govern-
65 ment of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due, at the rate of — per cent. per month, until paid, payable monthly, both principal and interest payable in like gold coin.

ERWIN DAVIS.

"EXHIBIT D."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 24th day of December, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due, at the rate of — per cent. per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

"EXHIBIT E."

$1,965.00. SAN FRANCISCO, *August* 26, 1869.

On the 23rd day of January, 1870, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P.
66 Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due, at the rate of — per cent. per month, until paid, payable monthly, both principal and interest payable in the like gold coin.

ERWIN DAVIS.

"EXHIBIT F."

SAN FRANCISCO, *Sept.* 8, 1869.

On demand I promise to pay to H. P. Wakelee or order six thou-

sand and fifty-five $\frac{35}{100}$ dollars in gold coin, with interest from date, at the rate of one per cent. a month.

$6,055.35. ERWIN DAVIS.

[U. S. int. rev. stamps, $3.05, cancelled.]

(Endorsed:) Service of the within notice and of copy of affidavit admitted this 28th day of June, A. D. 1873. R. Thompson, att'y for s'd b'k'pt. Filed June 28th, 1873, at 12.15 — m. Edw'd B. Cotter, clerk, by A. D. Grimwood, dep. cl'k.

67 "EXHIBIT B."

In the District Court of the United States for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

In this matter H. P. Wakelee, a creditor of the bankrupt herein, having heretofore filed his petition praying for leave to commence such actions at law and suits in equity as he may be advised against the said bankrupt for the recovery of the claims and demands held by the said creditor against the said bankrupt, and said petition coming on to be heard this day, the said petitioner appearing by his attorney, W. H. L. Barnes, Esq., and the said bankrupt by his attorney, R. Thompson, Esq.:

Now, on this the 8th day of July, A. D. 1873, after hearing the respective parties, on motion of W. H. L. Barnes, Esq.,—

It is ordered that the said H. P. Wakelee have leave, and leave is hereby granted him, to commence any action or actions at law or suits in equity against Erwin Davis, the bankrupt herein, as he may be advised, in any court or courts in any State or country having jurisdiction of the person or property of the said Erwin Davis.

OGDEN HOFFMAN,
District Judge.

Dated San Francisco, California, the 8th day of July, A. D. 1873.

68 "EXHIBIT C."

In the District Court of the United States, District of California.

In the Matter of ERWIN DAVIS, Bankrupt.

And now comes H. P. Wakelee and respectfully shows to this honorable court—

1st. That he is a creditor of said Erwin Davis, bankrupt.

2nd. That he has duly proved his claim against the estate of said bankrupt in the manner provided by law.

3rd. That he opposes the petition of said bankrupt from a discharge of the debts and liabilities, and, having duly filed his appearance on the return day set by the court for the hearing of said petition for a discharge, presents the following grounds and specifications of opposition to the discharge of said bankrupt:

I.

That said bankrupt has concealed his books relating to his estate and effects.

II.

That said bankrupt, being a merchant and trader, has not,
69 subsequent to the passage of the act of bankruptcy referred to in his said petition, kept proper books of account.

III.

That he has procured the assent of G. A. Treadwell, of Wm. J. Bryan, of G. F. Bragg, of Marsh, Pillsbury & Co., of J. W. Perkins and W. G. Taylor, of J. W. Perkins, of Wm. Thompson, Jr., of W. G. Taylor, of Williams, Dean & Co., of C. L. Place & Co., of Robert Hannigan, of H. H. Hill, of the London and San Francisco Bank, Limited, a foreign corporation doing business at San Francisco, in the State and district aforesaid; of C. J. Pillsbury, said persons being creditors of said Erwin Davis, bankrupt, and of each and every of them, to his discharge in bankruptcy by pecuniary considerations and obligations.

IV.

That he has influenced the action of the creditors named in specification III, and of each of them, with reference to his discharge in bankruptcy by pecuniary considerations and obligations.

V.

That said Erwin Davis has been guilty of fraud, contrary to the true intent of the act of Congress referred to in said petition, is this, in that the said Erwin Davis, having been duly summoned and required to appear for the purposes required by section 26 of said act,
did, clandestinely and fraudulently and while said examina-
70 tion was pending and in progress, abscond and depart from this State and district, and said Erwin Davis has ever since remained absent and out of the jurisdiction of this court and of the jurisdiction of the courts of the United States of America.

And this contestant respectfully shows to his honorable court that said Erwin Davis is not entitled to have and receive from this court his discharge in bankruptcy, because said Erwin Davis has not in all things conformed to his duty under said act, in this:

That said Erwin Davis having been adjudged a *a* bankrupt on his own petition, and having become subject to the orders of this court, said Erwin Davis was duly summoned and required to appear before the register in bankruptcy before whom these proceedings were pending, to be examined on oath upon matters relating to the disposal or condition of his property, and generally for the purposes required by section 26 of said act of congress; that pending his said examination and during an adjournment of such examination the said Erwin Davis, without leave of court or that of his creditors or of his assignee in bankruptcy or of any other person having authority to grant such leave or consent, withdrew himself

from such examination and clandestinely and fraudulently departed from this State and went out of the jurisdiction of this court and departed for Europe, where said Erwin Davis has ever since been.

That by reason thereof said Erwin Davis was not fully examined as required, and by reason of his said absence this opposing creditor has not been able to avail himself of his rights to examine said bankrupt in accordance with the provisions of said section 26 and of the provisions of said bankrupt act.

That such withdrawal occurred in the year 1870, and said Erwin Davis has ever since that time remained absent.

71 Wherefore this contestant prays that the application of said bankrupt for his discharge in bankruptcy be denied.

J. NAPTHALY AND
W. H. L. BARNES,
Att'ys for Contestant.

(Endorsed:) Filed February 23rd, 1876, at 3.15 p. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

"EXHIBIT E."

In the United States District Court, District of California.

In the Matter of ERWIN DAVIS, a Bankrupt.

To H. P. Wakelee, Esq., and J. Naphtaly and W. H. L. Barnes, his attorneys:

You will please take notice that upon behalf of Erwin Davis, the above-named bankrupt, I shall move this honorable court, at the court-room thereof, in the city and county of San Francisco, on Tuesday, the 28th day of March, 1876, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an

72 order cancelling the proof of debt heretofore made in the above-entitled cause against the estate of the said Erwin Davis by H. P. Wakelee and to dismiss and disregard the specifications of opposition filed by the said H. P. Wakelee to the discharge of the said Erwin Davis in bankruptcy.

The motion will be made upon the annexed petition, of which a correct copy is herewith served upon you, and upon the files, records, papers, and proceedings in the above-entitled matter.

Dated San Francisco, March 17th, 1876.

R. THOMPSON,
Att'y for Petitioner.

"EXHIBIT D."

In the United States District Court, District of California.

In the Matter of ERWIN DAVIS, a Bankrupt, in Bankruptcy.

And now comes Erwin Davis, the above-named bankrupt, by his attorney, R. Thompson, and moves the court for an order cancelling the proof of debt heretofore made in the above-entitled cause against

the estate of the said Erwin Davis by Henry P. Wakelee and to dismiss and disregard the specifications of oppositions filed by the said Henry P. Wakelee to the discharge of the said Erwin Davis in bankruptcy on the following grounds—that is to say:

73 The said Henry P. Wakelee, on or about the 28th day of June, A. D. 1873, and after he had proved up his debt or claim against the said estate of Erwin Davis, petitioned this court for, and on or about the 8th day of July, A. D. 1873, obtained from this court, an order granting leave to the said Henry P. Wakelee to commence any action or actions at law or suits in equity against the said Erwin Davis, the bankrupt herein, as he may be advised in any State or country having jurisdiction of the person or property of the said Erwin Davis.

That thereafter, to wit, on or about the 19th day of July, A. D. 1873, the said Henry P. Wakelee commenced an action in the fifteenth judicial district court in and for the city and county of San Francisco against the said Erwin Davis for the same cause of action on which he had proved up his debt in the said bankruptcy proceedings, and in the due course of the said action the said Henry P. Wakelee obtained a judgment of the said fifteenth district court in his favor and against the said Erwin Davis, which said judgment still stands of record in the said fifteenth district and is in full force.

R. THOMPSON,
Att'y for Petitioner.

74 STATE OF CALIFORNIA, } *ss.:*
City and County of San Francisco, }

R. Thompson, being duly sworn, doth depose and say that he is the attorney for the above-named bankrupt, Erwin Davis; that he had read the foregoing petition and the statement upon which the same is based, and that the facts set forth in said statement are true of his own knowledge.

R. THOMPSON.

Subscribed and sworn to before me this 18th day of March, 1876.
DAVID LYON,
Commissioner U. S. Circuit Court, Dist. of California.

Service of within is hereby admitted March 18th, 1876.
J. NAPHTALY,
W. H. L. BARNES,
Att'y- for Contestants.

(Endorsed:) Filed March 18th, 1876, at 11.55 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

75 "EXHIBIT F."

In the United States District Court, District of California.

In the Matter of ERWIN DAVIS, a Bankrupt.

The matter of the motion of Erwin Davis, the above-named bank-

rupt, for an order cancelling the proof of debt heretofore filed in this court by H. P. Wakelee against the said estate and for an order dismissing and disregarding the specifications of opposition filed by the said Wakelee to the final discharge of the said Davis in bankruptcy coming on regularly to be heard, and it having been argued by the attorneys for the respective parties and duly submitted upon the proofs taken, and it having been duly considered by the court—

It is hereby ordered, adjudged, and decreed that all proofs of debt heretofore made and filed in this court by H. P. Wakelee against the estate of Erwin Davis, a bankrupt, be, and the same are hereby, cancelled; and it is further ordered, adjudged, and decreed that the specifications of opposition heretofore filed in this court to the final discharge of Erwin Davis in bankruptcy by H. P. Wakelee be, and the same are hereby, dismissed and set aside and shall in all things hereafter be disregarded.

OGDEN HOFFMAN,
Dist. Judge.

(Endorsed:) Filed October 31st, 1876, at 11.20 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

76 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE
against
ERWIN DAVIS. } In Equity.

The Demurrer by Erwin Davis to the Amended Bill of Complaint of Angelica Wakelee, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint, as amended, to be true in such manner and from as the same are therein and thereby set forth and alleged, doth demur thereto, and for a cause of demurrer showeth that the said complainant hath not by her said bill made such a case as entitles her in a court of equity to any relief from or against this defendant touching the matters contained in the said bill or any such matters.

I certify that in my opinion the foregoing demurrer of Erwin Davis, defendant, to the amended bill of complaint of Angelica Wakelee, complainant, is well founded in law and proper to be filed in the above cause.

H. A. ROOT,
Solicitor and Counsel for Defendant, Erwin Davis.

Office & post-office address, 10 Wall street, New York city.

77 UNITED STATES OF AMERICA, } ss:
Southern District of New York,

Erwin Davis, being duly sworn, doth depose and say that he has

read the foregoing demurrer to the amended bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

ERWIN DAVIS.

Sworn to before me this 11th day of February, 1889.

THOMAS SPARLING,
Notary Public (338), *N. Y. Co.*

78 United States Circuit Court, Southern District of New York.

PIERRE B. CORNWALL
against
ERWIN DAVIS.

ANGELICA WAKELEE
against
ERWIN DAVIS.

In each of the above bills in equity the defendant has demurred to the bill. The bills of complaint in the two suits present the same questions, and the demurrers are upon the same grounds. It is therefore only necessary to state the facts which are alleged in one suit.

The bill of complaint in the Cornwall case alleges the following facts:

On August 26th, 1869, at San Francisco, California, the defendant Davis made his five promissory notes in writing, for value, to the order of P. B. Cornwall, and delivered the same to him, all of which were time notes, amounting in all to $13,783.70, of which only the sum of $1,407.43 has ever been paid.

On September 11, 1869, defendant filed in the United States district court for the district of California, in bankruptcy, his
79 petition to be adjudged a voluntary bankrupt, and was adjudged a bankrupt on September 30, 1869.

The debts due from the defendant to said Cornwall, as evidenced by said promissory notes, were duly proved in said bankruptcy proceedings. The defendant filed his petition for a discharge on December 23, 1875.

Upon a petition of said Cornwall on July 30, 1872, said district court granted him leave to sue defendant upon said notes. The petition, which is a part of the bill, alleged, among other things, that Davis was then reputed to reside in the State of New York.

Pursuant to said order, in August, 1872, he began an action upon said notes against said defendant in the district court of the fifteenth judicial district of the State of California by publication of summons therein, under the laws of the State of California, and without personal service of the summons upon said defendant.

Thereafter and on December 18, 1872, said Cornwall, without personal service of summons upon said Davis and without his appearance in said action, by attorney or in person, and without his answering or demurring to the complaint therein, and without any

proceedings by attachment or *in rem* therein, obtained a judgment against said Davis in said court adjudging that he recover $17,043.64, with interest thereon.

On December 23, 1875, Davis filed in said bankruptcy proceedings a petition for his discharge in bankruptcy, and on or
80 about February 23, 1876, said Cornwall filed in said proceedings specifications of opposition thereto.

On March 18, 1876, Davis filed in said bankruptcy proceedings his petition and notice of motion for an order canceling said Cornwall's proof of debt and dismissing the said specifications of opposition because the said Cornwall, on or about July 26, 1872, and after he had proved his debt against the said estate, obtained an order from the bankruptcy court granting him leave to commence any action or actions at law or suits in equity against the said Davis.

That on or about August 2, 1872, the said Cornwall commenced the above-mentioned action for the same cause of action on which he had proved his debt in the said bankruptcy proceedings and obtained judgment in his favor and against the said Erwin Davis, which said judgment was in full force.

That said motion came on to be heard before said court July 20, 1876, and argument was made by counsel for both Cornwall and Davis upon said petition, notice of motion, and specifications of opposition to the bankrupt's discharge, and it was then and there claimed, declared, and admitted, and assurance was made in open court, by counsel duly authorized thereto, for and in behalf of said defendant, that the original debts of said Davis due to said Cornwall and proved in said bankruptcy proceedings had merged in said judgment obtained December 18, 1872, and thereby became
81 a new debt, created since the adjudication of said Davis as a bankrupt; that said judgment was subsisting, valid, and enforcible, and that said judgment debt would not be barred or discharged or in anywise affected by the discharge in said bankruptcy proceedings of said Davis, but would remain standing of record and valid; and, further, that Cornwall had, by reason of such facts, no standing, and was not interested in such bankruptcy proceedings, and was not, therefore, a party competent to oppose the discharge of said bankrupt.

On October 31, 1876, an order was made in said bankruptcy proceedings that all proofs of debt theretofore made and filed in said court by Cornwall against the estate of Davis be canceled, and that the specifications of opposition theretofore filed by said Cornwall be dismissed and set aside.

That said order of October 31, 1876, was based upon and made by reason of said claims and representations of counsel for said defendant, Davis; that Cornwall relied upon and accepted as true and binding said claims and representations of said Davis; that said judgment was valid and binding on him, the said Davis, and that the same would not be barred by a discharge in bankruptcy of said Davis, and was thereby induced to accept as binding and correct in law the said order of the said United States court, and by reason of

said admissions and representations was induced to accept and did accept the order and did not appeal therefrom.

82 Davis thereafter obtained his final discharge in bankruptcy in said proceedings, and Cornwall never, after October 31, 1876, made any opposition to said Davis' petition for his discharge in bankruptcy.

Said judgment of December 18, 1872, is still standing of record in said court, and is, in equity, of full and binding force and valid by reason of said facts, and the whole amount thereof remains due to Cornwall from Davis.

Cornwall claims upon all the premises that the defendant is forever estopped from setting up against him, concerning said judgment of December 18, 1872; that the debts proved in bankruptcy as aforesaid were not merged in said judgment; that it is not valid; that it does not constitute a new debt which is unaffected by said Davis' said final discharge in bankruptcy, and that said discharge is a bar to any such suit upon said judgment.

Heretofore in various courts in sundry actions upon said judgment between said Davis and Cornwall, and which were discontinued or terminated without prejudice to Cornwall, said Davis has claimed and set up and still claims and sets up that said judgment of December 18, 1872, is void because of the lack of jurisdiction of the court wherein it was entered, for the reason that said Davis was not personally served with process, did not appear in the action in any manner, and that the action was not *in rem* or commenced by attachment; and, further, that he has obtained a discharge

83 in said bankruptcy proceedings, which forever bars all recovery upon said judgment, and such discontinuances were had because said Davis so claimed and set up; that said Davis has frequently threatened and still threatens and Cornwall has reason to believe will endeavor to defeat recovery upon said judgment in any action that may be brought thereon by Cornwall by setting up the same defense.

The bill further alleges that Cornwall is about to commence an action at law upon said judgment of December 18, 1872, against Davis to recover the amount due thereon as aforesaid in the State of New York, wherein Davis resides; that, as Cornwall is advised and believes, under the law of the State of New York, where said action is to be brought, in an action at law to recover the amount due upon such judgment the facts subsequent to such judgment, as hereinbefore set forth, and constituting the estoppel, as herein claimed and insisted upon, may not be pleaded in the plaintiff's complaint as or in aid of a cause of action, but that such action must be brought upon such judgment alone, and that by the law of the State of New York it is necessary in an action at law upon such judgment to allege in the complaint either the facts showing the jurisdiction of the court in which the judgment was entered or that the judgment was duly entered, and that unless this be done the complaint would be dismissed on demurrer; that Cornwall is unable truthfully to allege in said complaint such

84 jurisdictional facts, or that such judgment was duly entered

and that he is thus remediless in an action at law to maintain his rights under such judgment and under the facts hereinbefore set forth; all of which acts, doings, and pretenses on the part of defendant since October 31, 1876, are contrary to equity and good conscience and tend to the manifest wrong and injury of Cornwall in the premises.

The bill then prays that Davis be adjudged to be forever estopped from claiming the said defenses hereinbefore stated, and also prays for an injunction.

To the bill of complaint the defendant has demurred, on the ground that the said complainant hath not such a case as entitles him in a court of equity to any relief.

SHIPMAN, *J.:*

It is virtually conceded by these averments that no action can be sustained upon the California judgment if the lack of jurisdiction in the court which rendered it is permitted to be shown, or if its defects are not shown to have been subsequently waived by Davis. The bill alleges that by the law of New York, in an action in that State upon the judgment, it is necessary to allege either the facts showing the jurisdiction of the California court or that the judgment was duly entered, and that the complainant is unable truthfully to allege in his complaint such jurisdictional facts or that the judgment was duly entered. The proceedings were taken,
85 under the existing statutes of California, against a non-resident. Davis had been apparently domiciled in that State or had been a resident therein, but had departed therefrom and was reputed to reside in New York. He was not served with process; he did not appear, and the proceeding did not affect him personally. (Cooper *v.* Reynolds, 10 Wall., 308; Pennoyer *v.* Neff, 95 U. S., 714.)

The object of the bill is to enjoin Davis against setting up either the invalidity of the judgment or his discharge from the debts which were provable against him in bankruptcy, upon the ground that an equitable estoppel exists which prevents him from asserting either of these defenses. Different considerations are applicable to the different defenses, which will therefore be considered separately.

The judgment was entered in 1872. In 1875 Davis filed in the district court a petition for his discharge in bankruptcy, and in 1876 Cornwall filed specifications of opposition thereto. Davis thereupon filed in said court his petition praying that Cornwall's proofs of debt might be cancelled and that his specifications should be dismissed, because after the proofs of debt were filed he had obtained judgment upon the same claims, which judgment still stood of record and was in full force. Davis founded his petition upon the judgment, based his application for the affirmative action of the district court thereon, and asserted its validity. It was his sole and successful
86 weapon of attack upon Cornwall. The judgment being against him, he set it up in bar of Cornwall's proofs of debt and specifications of opposition to the discharge, and by that act he affirmed "the validity of the judgment against himself, and is *eo instanti* estopped to impeach it thereafterwards." (Henderson *vs.*

Standiford, 105 Mass., 504; Hughes *vs.* Dundee, &c., Co., 28 Fed. Rep., 40; Railway Co. *vs.* McCarthy, 96 U. S., 267.) A party cannot successfully rely upon and affirmatively set up a judgment as valid to defeat his adversary's claim and subsequently attempt to rely upon its invalidity. Although it was invalid when rendered, he has, by his subsequent conduct and "by accepting the benefits which it conferred," given it validity, and it can no longer be considered as against him, a void judgment. (Mills *v.* Hoffman, 92 N. Y., 181.)

Is there necessity for resort to a court of equity to obtain the benefit of this estoppel?

It is now settled that the mere fact that an estoppel is what is called an equitable estoppel does not compel the party who relies upon it to resort to equity, but it may be used with equal advantage in a court of law, and that "in order to justify a resort to a court of equity it is necessary to show some ground of equity, other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law." (Dickerson *v.* Colgrove, 100 U. S., 528; Drexel *v.*
87 Berney, 122 U. S., 241.) The ground of equity in this part of the case is the averment which was once conceded by the defendant in argument to be true, and which we therefore assume to be true, that in an action at law upon a judgment in the State of New York it is necessary to allege in the complaint either the facts showing the jurisdiction of the court in which the judgment was entered or that it was duly entered, and unless this is done the complaint will be dismissed on demurrer. It thus appears that it is uncertain whether Cornwall could so frame his complaint as to be able to obtain a standing in a court of law unless Davis should be prevented from taking advantage of the defective jurisdiction of the California court, and that it is improbable that the plaintiff could, at the outset of his case, avail himself of this estoppel so as to gain a foothold in court. It follows that a case is stated—in that part of the bill which relates to the defence of the invalidity of the judgment—which entitles the complainant to relief in a court of equity. (Drexel *v.* Berney, 122 U. S., 241.)

The remaining portion of the bill presents a different question. The complainant contends that Davis is estopped from shifting his ground as to the effect of the judgment of December, 1872. His position in the petition to the district court, in his argument, and in his successful effort to obtain the order of October 30th, 1876,
was that the judgment created a new cause of action, in
88 which the pre-existing notes were merged; that neither judgment nor notes were provable, that the judgment would not be barred by the discharge in bankruptcy, and that consequently Cornwall's proofs should be canceled and his specifications of opposition should be dismissed, whereas he now claims that the debt was the same before and after judgment, and that the discharge in bankruptcy is effectual against the judgment.

The status of a debt which existed at the time of an adjudication in bankruptcy, but which was represented by a judgment entered

against the bankrupt after the adjudication and before his discharge, was, at the date of the order of October 31st, 1876, a matter upon which the decisions were very contradictory. The subsequent decision of the Supreme Court in Boynton *v.* Ball (121 U. S., 457) was against the theory of Davis' petition and the opinion of the district court.

The question is thus raised whether Davis can be now permitted to change his position as to the legal effect of the judgment, which he insisted, in 1876, would not be barred by his discharge and now insists was barred thereby. He obtained the order of the district court upon the old theory and enjoyed the benefit of it, and now wishes to obtain the aid of the opposite and recently established theory. The question is not the same which has just been considered. That involved the propriety of a party's abandoning his position in regard to the existence of a judgment, whereas this
89 relates to the propriety of his changing his position in regard to the legal effect of the judgment. The plaintiff says that the principles which govern the decision of the two questions are the same.

I do not propose to decide this question, because I see no difficulty in the plaintiff's having the benefit of this alleged estoppel in his action at law. If Davis pleads his discharge in bankruptcy, it is substantially conceded that the facts which constitute the estoppel can be given in evidence by the plaintiff (Philadelphia, &c., Railroad Co. *v.* Howard, 13 How., 307). There is nothing outside the estoppel which prevents the plaintiff from making it available in his action at law (Drexel *v.* Berney, *supra*).

The demurrer is overruled.

Anson Maltby, for the plaintiff; Henry A. Root and T. D. Kenneson, for the defendant.

Filed June 10, 1889.

90 At a stated term of the circuit court of the United States for the southern district of New York held at the post-office building in the city of New York on the 27th day of June, 1889.

Present: Hon. Nathaniel Shipman, judge.

Angelica Wakelee
against
Erwin Davis. } In Equity.

The bill of complaint in this action having been filed on the 13th day of April, 1888, and a demurrer to said bill having been filed on June 4th, 1888, and thereafter and on June 27th, 1888, pursuant to an order of this court, amendments to said bill of complaint having been filed and a demurrer to the bill of complaint as so amended having been filed on August 6th, 1888, and thereafter and on the 23rd day of October, 1888, said demurrer to said bill of complaint as so amended having come on to be heard at a stated term of this court held in the post-office building in the city of New York, before Hon. Alfred C. Coxe, and said demurrer having been allowed

with costs to be paid by complainant to defendant, with leave
91 to complainant to amend her bill of complaint herein within twenty days after the entry of the order allowing said demurrer and service of a copy thereof, and the complainant having filed an amended bill on the 4th day of February, 1889, and a demurrer to said amended bill having been filed on the 11th day of February, 1889, and thereafter and on the 8th day of April, 1889, said demurrer to said amended bill of complaint having come on to be heard at a stated term of this court held in the post-office building in the city of New York, before Hon. Nathaniel Shipman, judge, and Henry A. Root and Thaddeus D. Kenneson, as counsel for defendant, Erwin Davis, having been heard in support of said demurrer, and Anson Maltby and Howard R. Bayne, of counsel for complainant, in opposition thereto: Now, on motion of Anson Maltby, solicitor for complainant, Angelica Wakelee, it is—

Ordered that the demurrer herein to said amended bill of complaint be, and it hereby is, disallowed and overruled with costs to the complainant as against the defendant.

And it is further ordered that the defendant herein, if so advised, may withdraw his said demurrer and file his answer to the said amended bill of complaint within twenty days after the entry of this order and service of a copy thereof upon the solicitor for the defendant.

And it is further ordered, adjudged, and decreed that in case said defendant shall fail so to withdraw his said demurrer and file his answer to said amended bill of complaint within said twenty
92 days that the said amended bill be taken against the said defendant, Erwin Davis, *pro confesso*, and the matter thereof be proceeded with and decreed accordingly.

(Signed) N. SHIPMAN, *Judge.*

(Endorsed:) United States circuit court. Angelica Wakelee ag'st Erwin Davis. Order. Anson Maltby, solicitor for complainant, 48 Wall St., New York. Sir: Please take notice that a copy of the within proposed order will be presented to Hon. Nathaniel Shipman at his chambers, in the post-office building in the city of New York, on the 25th day of June, 1889, at 11 o'clock in the forenoon of said day, for settlement. Dated New York, June 22nd, 1889. Yours, &c., Anson Maltby, solicitor for complainant. Office and P. O. address, 48 Wall St., New York city. To Henry A. Root, Esq. solicitor for defendant, 10 Wall St., New York city. Service of a copy of within proposed order & notice of settlement above is hereby admitted. New York, June 24, 1889. H. A. Root, att'y for Davis.

93 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE, Complainant,
against
ERWIN DAVIS, Defendant.
} No. —. In Equity.

The Answer of the Defendant, Erwin Davis, to the Bill of Complaint Filed in the Above Suit.

This defendant, now and at all times hereafter saving and reserving to himself all benefit and advantage of exception which can or may be taken to the many errors, uncertainties, and imperfections in the complainant's bill of complaint contained, for answer thereto or to so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer to—this defendant, answering, says:

I. This defendant admits that the allegations contained in paragraph II of the bill of complaint herein are true.

94 II. This defendant admits that the allegations contained in paragraph III of the bill of complaint herein are true, except that this defendant denies the delivery therein alleged was made for value, and this defendant avers that no consideration or value was ever received by the defendant for the signing or delivery of said promissory notes, and that the signing and delivery of the same to H. B. Wakelee were wholly without consideration.

III. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph IV of the bill of complaint herein and therefore denies the same.

IV. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph V of the bill of complaint herein and therefore denies the same.

V. This defendant admits the allegations contained in paragraph VI of the bill of complaint herein.

VI. This defendant admits the allegations contained in paragraph VII of the bill of complaint herein.

VII. This defendant admits the allegations contained in paragraph VIII of the bill of complaint herein.

VIII. This defendant admits the allegations contained in paragraph IX of the complaint herein.

IX. This defendant admits the allegations contained in paragraph X of the bill of complaint herein, except that this defendant denies any neglect on his part in procuring his discharge.

95 X. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XI of the bill of complaint herein and therefore denies the same.

XI. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XII of the bill of complaint herein and therefore denies the same.

XII. This defendant has no knowledge or information sufficient

to form a belief as to the allegations contained in paragraph XIII of the bill of complaint herein and therefore denies the same.

XIII. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XIV of the bill of complaint herein and therefore denies the same.

XIV. This defendant admits the allegations contained in paragraph XV of the bill of complaint herein.

XV. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XVI of the bill of complaint herein and therefore denies the same.

XVI. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XVII of the bill of complaint herein and therefore denies the same.

XVII. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XVIII of the bill of complaint herein and therefore denies the same.

XVIII. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XIX of the bill of complaint herein and therefore denies the same.

96 XIX. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XX of the bill of complaint herein and therefore denies the same.

XX. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXI of the bill of complaint herein and therefore denies the same.

XXI. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXII of the bill of complaint herein and therefore denies the same.

XXII. This defendant admits the allegation contained in paragraph XXIII to the effect that he thereafter obtained his official discharge in bankruptcy in said proceedings.

XXIII. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXIV of the bill of complaint herein and therefore denies the same.

XXIV. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXV of the bill of complaint herein and therefore denies the same.

XXV. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXVI of the bill of complaint herein and therefore denies the same.

XXVI. This defendant has no knowledge or information sufficient to form a belief as to whether the judgment obtained by Henry P. Wakelee against this defendant on November 18, 1873, is still standing of record, as alleged in paragraph XXVII of the

97 bill of complaint herein, but this defendant denies that if such judgment is still standing of record that it is in equity

of full and binding force and validity by reason of the facts alleged in the bill of complaint herein or by reason of any other facts.

XXVII. This defendant denies that $22,809.26, with interest thereon, as alleged in paragraph XXVIII of the bill of complaint herein, is due from this defendant to the complain-t herein, and this defendant avers that nothing is due from him to the complainant herein.

XXVIII. This defendant denies each and all of the allegations contained in paragraph XXIX of the bill of complaint herein.

XXIX. This defendant denies the allegations contained in paragraph XXX of the bill of complaint herein.

XXX. This defendant denies the allegations contained in paragraph XXXI of the bill of complaint herein.

XXXI. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXXII of the bill of complaint herein and therefore denies the same.

XXXII. This defendant denies each and all of the allegations contained in paragraph XXXIII of the bill of complaint herein.

XXXIII. This defendant denies each and all of the allegations contained in paragraph XXXIV of the bill of complaint herein.

And this defendant denies that there is any other matter, cause, or thing in the said complainant's bill of complaint contained material or necessary for this defendant to make answer unto
98 and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

HENRY A. ROOT,
Solicitor for Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Henry A. Root, being duly sworn, says that he is the solicitor for the defendant, Erwin Davis, in this action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true. The source- of deponent's knowledge and belief are frequent conversations had with the defendant, Erwin Davis, and also information gained in previous litigation by the plaintiff against the defendant. Your deponent has his office at No. 10 Wall street, in the city of New York, and resides at One Hundred and Eighty-second street and Ridge road, in said city of New York. The reason why this answer is not verified by the defendant herein is that the defendant is not within the southern district of the State of New York and will not be therein until after the 20th day of August, 1889, the last day within — the answer herein can be filed and served.

HENRY A. ROOT.

Subscribed and sworn to before me this 19th day of August, 1889.
MICHAEL W. NOLAN,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

99 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE, Complainant,
against
ERWIN DAVIS, Defendant. } In Equity. No. 4411.

The replication of Angelica Wakelee, complainant, to the answer of Erwin Davis, defendant.

This repliant, saving and reserving unto herself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that she will aver, maintain, and prove her said bill of complaint to be true, certain, and sufficient at law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by her said bill she has already prayed.

ANSON MALTBY,
Complainant's Solicitor.

100 U. S. Circuit Court for the Southern District of New York.

ANGELICA WAKELEE
vs.
ERWIN DAVIS.

Testimony taken before John A. Shields, Esq., one of the standing examiners of the court, under and pursuant to the 67th rule of the Supreme Court of the United States as amended.

NEW YORK, *February 11th*, 1890.

There were present the examiner and Anson Maltby, Esq. (Mr. Bayne), complainant's solicitor; Henry A. Root (Mr. Codding), solicitor for defendant.

101 ANSON MALTBY, called as a witness for the complainant, being duly sworn, testified as follows:

Examined by Mr. BAYNE:

Q. 1. Please state your age, residence, and occupation.

A. Forty-two years old. I live in this city, and am a lawyer.

Q. 2. Are you complainant's solicitor in this case?

A. I am.

102 Q. 13. I call your attention to the 31st paragraph of the bill of complaint. Certain allegations there are made with reference to threats of the defendant in regard to the character of the judgment in suit, and the effect of a discharge thereupon. Will you please state whether you know of any such threats?

A. Yes; I do.

Q. 14. Will you be kind enough to say when and where they were made?

A. They were made in court by his counsel on the last argument of the demurrer before Judge Shipman, and in his brief, a copy of which was served upon me.

Q. 15. Look at the document now shown you, purporting to be the brief and points for the defendant on the demurrer, and say if that document was served upon you by the defendant.

A. It was.

Mr. BAYNE: I will read in evidence the following sentences from page 16, &c.

Mr. CODDING: I object to the counsel reading anything from any paper that has not been served in the proceedings since the service of the amended complaint.

Mr. BAYNE (reading): "We claim that the statements made in the petition filed March 18, 1876, and the statements made in the argument upon the petition as set forth in paragraph 17 of the bill did not constitute an estoppel which at that time or since should prevent Davis from claiming that the judgment of December 18, 1882, was and is in law utterly void and not valid because the court of California had not the jurisdiction to grant the same."

103 Also from page 14 of said brief:

"Assuming, however, for the sake of argument, that this court would decline to grant an injunction against Davis on the ground that such injunction would be useless, we insist that complainant has failed to set out facts which in any way would estop the defendant from insisting in the action at law by demurrer or otherwise that his judgment of December 18 was and is absolutely invalid and absolutely void, and that the complaint, upon such a judgment, shows no cause of action."

Also from page 24:

104 "We submit, first, that the court never intended, in making the order of October 31st, to determine anything whatever as to the effect of the discharge set out in these bills of complaint upon the judgment of November 18, 1873; and, second, that if the court did intend to determine that such discharge should not operate to release the judgment of November 18, this determination was without any force and was absolutely void and is not binding upon Davis."

Also from page 31:

"The claims, declarations, admissions, assurances, and represen-

tations of counsel duly authorized thereto made in open court do not estop Davis from now claiming either that the judgment of December 18, 1872, was invalid or from setting up his discharge in bankruptcy as a defence thereto."

WITNESS: This brief was entitled in both cases of Cornwall against Davis and Wakelee against Davis, which were argued at the same time.

Mr. CODDING: I move to strike out all the extracts that have been read by counsel on the grounds that we raised as objections to their admission, and on the further ground that they have not been sufficiently connected with these cases.

Q. 16. Representing your client in this case, do you propose to commence a suit at law, if you should be so advised upon the termination of this proceeding—this suit in equity?

A. I do, for the purpose of recovering on the judgment.

105 ANSON MALTBY, a witness for the complainant, having been recalled, testified as follows:

Direct examination:

By Mr. BAYNE, of counsel for complainant:

Q. 25. Mr. Maltby, are you the witness who was previously called and testified in this action?

A. Yes, sir.

Q. 26. Did you at any time have anything to do with any litigation between H. P. Wakelee, plaintiff, and Erwin Davis, the defendant, in this action?

Mr. CODDING: Objected to, unless the question refers to the same subject-matter as that involved in this action.

106 A. Not under that name.

Q. 27. Under what name did you have any connection with any such litigation?

(Same objection as before.)

A. Under the name of Fielding L. Marshall *vs.* Erwin Davis.

Q. 28. Did such litigation refer to the notes set out in the bill of complaint in this action?

A. Yes, it did.

Q. Please state the circumstances under which such litigation was begun.

(Same objection.)

A. The judgment set forth in the bill of complaint was brought to me in the form of a judgment-roll by Laidlaw & Company, agents of the Bank of California, in 1881, together with an assignment of the judgment, which was entitled "Henry P. Wakelee against Erwin Davis," brought in the judicial district court.

Q. 30. Which judicial district?

A. The 15th judicial district in and for the city of San Francisco—I think it is called the judicial district court of California—and also

an assignment of the said judgment by the said H. P. Wakelee to Charles E. Laidlaw, one of the members of the said firm, with instructions to sue the defendant herein upon that judgment. I told them that judgment was void, because of the lack of service.

Q. 31. Because of the lack of personal service, you mean?

A. Yes; because of the lack of personal service of the summons upon Erwin Davis, the defendant. In November, 1881, Henry P. Wakelee called upon me himself, and I repeated the advice, and I advised him upon receiving information that the promissory notes upon which the judgment had been obtained had been
107 proven in bankruptcy against Erwin Davis, a bankrupt, and that subsequently to such proof the court having jurisdiction in the bankruptcy case had granted leave to Wakelee to sue Davis in any jurisdiction. This leave to sue and the judgment-roll and assignment have already been produced in evidence in this case. I advised him that, under this leave to sue, and the decision of the general term of the supreme court in this State reported in McDonald *v.* Davis, in 26 Hun, page 53, he had the right of recovery—at least, that the owner of the claim had the right of recovery on the notes, and that the judgment was void. The Bank of California had a lien upon the whole claim as security for indebtedness of Wakelee to that bank. In order to protect this lien the notes were assigned by Wakelee to Fielding L. Marshall, then a student in my office, which assignment has been put in evidence in this case, and I accordingly brought suit in the name of Marshall upon these notes against Erwin Davis. This suit was brought in the supreme court of New York upon all the notes which are set forth in the bill of complaint herein.

The defence was that nothing was due upon the notes; that the claim was barred by the discharge in bankruptcy of Erwin Davis granted by the United States district court for the district of California in March, 1877, and that no consideration had been given for the notes. This case was pending for some years, awaiting, on the insistance of defendant's counsel, a decision of the McDonald case by the court of appeals in this State. Meantime Hery P. Wakelee died. His indebtedness to the Bank of California was discharged, the notes were assigned by Marshall to his widow, Angelica Wakelee, the present complainant, and subsequently the judgment was also assigned.

Q. 32. To Mrs. Wakelee?

A. To Mrs. Wakelee. The Bank of California had no
108 claim to it after the payment of the indebtedness. Mrs. Wakelee was substituted, in the spring of 1886, as plaintiff in that suit, in the place of Marshall, and the action was continued in her name. In the spring of 1887 the court of appeals in the McDonald *vs.* Davis case reversed the decision of the supreme court in general term, and thereupon, shortly after that decision of the court of appeals, I moved to discontinue the case of Wakelee *vs.* Davis in the supreme court of this State. This motion was made in June, 1887, and finally disposed of in October of the same year The case was discontinued on payment of an extra allowance of

$471.60, and taxed costs and disbursements of $173.45, making in all $645.05 paid to the defendant by the plaintiff.

Q. 33. And that plaintiff was this complainant?

A. That plaintiff was this complainant. I did not know, until shortly before the discontinuance, of the facts occurring during, upon, and on account of the motion in the United States district court for the district of California, in the matter of Erwin Davis, a bankrupt, to strike out the proofs of debt of Henry P. Wakelee in that case and to forever disregard the same and to dismiss his specifications of opposition to the discharge of such bankrupt. The proceedings on the motion were commenced in the spring of 1877, and were finally decided by an order in that case of October 31st, 1877.

Q. 34. 1877 or 1887?

A. 1877. Of these estoppels I became fully aware at about the time of my motion to discontinue the case in the New York supreme court, in the spring of 1887. After the discontinuance, in October, 1887, I was ordered South on account of my health, being very ill, and while there, as soon as I was physically able, I drew the first bill in this suit and caused it to be filed in this court and this suit begun.

Q. 35. You being absent at the time in the South?

A. I being then absent in Florida, where I had spent the winter.

109 Mr. CODDING: I will object to the admission of this statement of the witness in evidence, and move to strike out those portions of it which refer to conversations with clients on the ground that they cannot bind this defendant; and I also object to the admission of statements regarding the various proceedings in actions other than this, and move to strike them out on the ground that they are matters of record and speak for themselves, and no explanation has been made here why these records or proper authentications from them have not been offered.

110 & 111 Examination-in-chief of WILLIAM H. L. BARNES on behalf of complainant:

(By Mr. BAYNE:)

Q. 1. State your name, age, place of residence, and occupation.

A. My name is William H. L. Barnes; my age fifty-two years; I reside in San Francisco, California, and I am by occupation an attorney-at-law.

Q. 2. How long have you been at the bar?

A. I was admitted to the bar of the State of New York in the year 1860. I came to California in 1863, arriving here on Tuesday afternoon of April 28th, about four o'clock. The next day but one I was admitted to the bar of this State and tried my first case, and since then I have been in active practice here.

Q. 4. Did you know Henry P. Wakelee in 1869 and up to 1881?

A. Very well.

Q. 5. Did you act in any of these years as attorney and counsel for H. P. Wakelee?

A. I did.

Q. 6. In what matter?

A. I was his general attorney.

Q. 7. Did you act especially as attorney in the matter of Erwin Davis in bankruptcy pending in the United States district court for the district of California?

A. I did.

112 Q. 8. Was this defendant, Erwin Davis, that bankrupt?

A. Certainly.

Q. 9. Who was his regular attorney in that matter in bankruptcy?

A. Well, R. Thompson, Esquire, here present, acted for him; Caleb Dorsey, of Tuolumne county, represented him, and Colonel Hoge, now Judge Hoge, also represented him, and I think there were one or two more I don't remember, but those gentlemen I especially remember. I was Mr. H. P. Wakelee's general attorney, and in all proceedings in which Mr. Wakelee figured against Davis I was his attorney.

Q. 10. What has become of Mr. Wakelee?

A. I am informed and believe that he died in New York several years ago. I know Mrs. Angelica Wakelee, the complainant in this action, who passes now for his widow.

Q. 11. General, did you act for H. P. Wakelee in said matter in bankruptcy in reference to an application for leave to sue the bankrupt?

A. Yes, sir.

Q. 12. Please look at the papers now shown you, endorsed "District court of the United States, district of California. 563. In bankruptcy. In the matter of Erwin Davis, bankrupt. Petition of Henry P. Wakelee and notice of motion. Service of within notice and a copy of affidavit admitted this 26th day of July, A. D. 1872. R. Thompson, attorney for said bankrupt. Filed July 27, A. D. 1872. Edward B. Cotter, clerk, by A. D. Grimwood, deputy clerk," and also paper endorsed, "563. United States district court of the district of California. In the matter of Erwin Davis, in bankruptcy. Order allowing H. P. Wakelee to commence suits against bankrupt. Filed July 8th, 1873. Edward B. Cotter, clerk, by A. D. Grimwood, deputy clerk," and say whether those papers embody the proceedings taken by you on such application for leave to sue.

113 A. These are the papers which were prepared in my office for that purpose.

Q. 13. And the order of the court made thereon?

A. Yes.

Duly certified copies of the documents last above referred to, attached together, are introduced in evidence by complainant and marked "Complainant's Exhibit Leave." (Bill, p. 12–22.)

Q. 14. Did you act as counsel for said Wakelee in a certain pro-

ceeding in said court to oppose the discharge in bankruptcy of said bankrupt?

A. I did.

Q. 17. Please look at the paper now shown you, endorsed, "563. United States district court. In the matter of Erwin Davis, bankrupt. Opposition of H. P. Wakelee to bankrupt's discharge. Filed February 3, 1876, at 3.15 p. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk. J. Napthaly and W. H. L. Barnes, solicitors for contestants," and state whether that embodies the opposition proceeding taken by you as counsel for said Wakelee.

A. It does.

Q. 18. Was that document prepared in your office?

A. Yes; I think so.

Complainant introduces in evidence duly certified copy of the document last above referred to, marked "Complainant's Exhibit Opposition." (Bill, p. 23–26.)

Q. 19. General, did you represent H. P. Wakelee in certain proceedings taken in said matter in said court to set aside the objection of H. P. Wakelee to the discharge of the bankrupt and to dismiss his proofs of debt?

A. Yes, sir.

114 Q. 20. Please look at the paper now shown you, endorsed, "563. In the U. S. district court. In the matter of Erwin Davis, bankrupt. Petition and notice of motion as to H. P. Wakelee. Filed March 18, 1876, at 11.55 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk. R. Thompson, attorney for bankrupt," and say whether that is the original petition and notice of motion filed on the part of said bankrupt.

A. It appears to be the petition and has my admission of service on it.

A duly certified copy of the document last above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Petition to Dismiss." (Bill, p. 26–29.)

Q. 21. Please look at the document now shown you, endorsed, "No 563. U. S. district court. In the matter of Erwin Davis, bankrupt. Stipulation and agreed statement of facts. Filed August 15, 1876, at 11.20 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk," and state if you recognize the signatures thereto.

A. I do.

Q. 22. Will you say you signed the same?

A. Well, I can tell you by whom it appears to be signed.

Q. 23. Well, you recognize the signatures. I went to prove the, handwriting of the gentlemen who signed it.

A. My impression is that Mr. Napthaly signed for himself and myself, and Caleb Dorsey signed for himself and the others; that is my impression. Upon further examination I say that for our side Mr. Napthaly signed for himself and me, and for the other side Caleb Dorsey signed for all the counsel.

Q. 24. Was that document submitted to the court on the motion to dismiss?

A. Yes, sir.

115 Q. 25. Was the motion submitted for decision upon the statement of facts contained in it after argument?

A. Yes.

The document last above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Facts." (*Infra* p. 51.)

Q. 26. General, were you present in court during the argument of said motion?

A. Yes.

Q. 27. Who else was present as counsel?

A. Both sides were represented by counsel. I think Colonel Hoge was there. Mr. Dorsey was there. Mr. Thompson was there. I was there, and Napthaly was there.

Q. 28. Who represented the side of H. P. Wakelee?

A. Napthaly and myself.

Q. 29. Will you please state what was said by the counsel for Davis on the argument of that motion in open court, so far as you can recollect—all that took place, so far as you recollect?

A. Well, the case was sharply contested and thoroughly argued. I would not undertake to recite the authorities that were cited nor to reproduce the speeches. They were all lengthy and able. "The gist of the whole matter was and Mr. Hoge said that Cornwall and Wakelee having, subsequent to Mr. Davis' petition in voluntary bankruptcy, obtained leave to sue him upon the notes made by Mr. Davis before his petition was filed, and having sued and having obtained judgments against the bankrupt, those judgments constituted in each case a new obligation or liability not included within the schedule of Davis' debts at the time his petition was filed and therefore not affected by his discharge in bankruptcy, and Cornwall and Wakelee were not parties in interest and were not affected

116 in any way, whether or not his discharge was granted. In support of this assertion he cited and read numerous authorities."

Mr. BARROWS: Respondent objects to and moves to strike out the answer upon the ground that it gives not the language of counsel upon that argument, but a gist of it as recollected by the witness; that it is not fully responsive to the question, and that the witness can only testify as to what he recollects; also that it is immaterial and irrelevant to the issue.

Q. 30. General, in view of the objection just interposed, do you remember the exact language used by the counsel for Davis on the argument of said motion?

A. By no means.

Q. 31. Will you give, then, to the best of your recollection, the substance of that language?

A. "Well, Colonel Hoge made quite an elaborate argument.

Many authorities were cited in support of his view, which I can only state briefly, or, as I stated before, the gist or point of his argument, which was that the opposing creditors having obtained leave to sue Mr. Davis subsequent to his petition in voluntary bankruptcy, and having sued and obtained judgments against him in a court of competent judisdiction in this State, that these creditors had no concern with the question whether or not he was to be discharged in bankruptcy, for the reason that the judgments constituted a new obligation or debt not existing at the time of Davis' petitition, and therefore not to be affected by his discharge."

Respondent objects to and moves to strike out the last answer of the witness upon the grounds stated in the objection to the last answer objected to.

117 Q. 32. Was Colonel Hoge the leading counsel for defendant Davis on that motion?

A. I would not say so in the presence of Judge Thompson.

Q. 33. I mean the counsel who argued the case.

A. Well, yes; I think he did more of the discussion than the other gentlemen. I think Colonel Hoge made the principal argument. Such is my recollection. He generally does.

Complainant introduces in evidence duly certified copy of the order entered upon the notice of motion to cancel the proofs of debt and dismiss and disregard the specifications of opposition to the discharge of the bankrupt, marked "Complainant's Exhibit Order of Cancellation." (Bill, p. 30.)

Q. 34. Referring now to the order which has just been introduced in evidence cancelling proofs of debt and dismissing and disregarding the opposition of H. P. Wakelee, did H. P. Wakelee acquiesce in said order?

A. Yes.

Q. 35. Was there ever any appeal from said order?

A. No.

Q. 36. General Barnes, do you know why no appeal was taken by H. P. Wakelee from the order dismissing and disregarding his specifications of objection?

A. I do.

Q. 37. Will you please state what that reason was?

A. At the time the judgments were obtained the case of Hahn against Kelly, reported in the 35 California Reports, established the law of this State with reference to the presumptions of verity upon a judgment-roll—that is to say, a judgment-roll reciting service would be assumed by the law to be personal service.

118 Hence our judgments, when recovered, were considered good. Subsequently and within a short time after these judgments were recovered the Supreme Court of the United States, in the case of Galpin *vs.* Page, and later on in Pennoyer *vs.* Neff, decided that such was not the presumption, and that jurisdiction of the person of a defendant could not be acquired by a court of this State outside of its territorial limits by publication of summons ex-

cept in cases where you could attach property and then proceed only against the *rem.* This decision changed, of course, the law of this State, because in later cases the supreme court of this State decided that although Hahn *vs.* Kelly had held the other way, yet, as the Supreme Court of the United States in Galpin *vs.* Page and Pennoyer *vs.* Neff had held the other way, they would hereafter follow the rule laid down by the Supreme Court of the United States and avoid a conflict. Now, all that, except the case of Pennoyer *vs.* Neff, I knew in 1876, when we had this contest before Judge Hoffman, but inasmuch as we had obtained a judgment, valid upon its face, in December of 1872, and up to the date of the opposition, in July or August, 1876, Mr. Davis had made no movement to set aside those judgments, I believed that they would still stand, because he could not move them or disturb them on account of his own laches. I thought we would be able to make them stick, as we did later on. Subsequently an application was made by Mr. Davis to Judge Dwinelle, of the district court of California in and for the fifteenth judicial district, for leave to reopen those cases and plead his discharge in bankruptcy. Judge Dwinelle, though fully informed of the fact that we had been prevented from resisting his discharge in bankruptcy by reason of these judgments so obtained, for reasons not made known and extremely unsatisfactory to me, did permit him to reopen both of those judgments and plead his discharge in bankruptcy against the judgments which the district court of the
119 United States had said could not be affected by it. From that order of Judge Dwinelle's I appealed to the supreme court of this State, and it very promptly reversed him.

Q. 38. Did H. P. Wakelee ever appear in said proceeding in bankruptcy after the order dismissing his opposition?

A. No.

Q. 39. Did he at any time after that ever attempt to oppose the discharge of said bankrupt?

A. No.

Q. 40. Referring now to the judgment recovered by H. P. Wakelee under the order of leave to sue, dated November 18th, 1873, in the fifteenth judicial district court of the State of California in and for the city and county of San Francisco, will you please state whether H. P. Wakelee, after the recovery of said judgment, took any steps with relation to the collection of the same?

A. He did.

Q. 41. Will you please state what those steps were?

A. The representative of Henry Kimber & Company, a firm of solicitors doing business in London, was here upon some business of his firm relating to a sale of California mining properties in London in which, if I remember right, Erwin Davis was somehow concerned. At all events, from what Mr. Storrey, the representative of Kimber & Company, said to me, I entrusted to him, for Kimber & Company, the judgments in these cases, properly exemplified, so as to enable Kimber & Company, representing Cornwall, and Wakelee and another creditor to bring suit and prove the cases in England or anywhere else Erwin Davis might be found. He took the docu-

ments with him to England, and, as I am informed by Kimber & Company and believe, as well as by the payment of their bills of expense incurred in the litigation, Davis was sued upon those judgments through the instrumentality or agency of Kimber & Company.

120 Q. 42. Do you know in what country?

A. Originally in England; and then, as he was reported to have a large amount of money or bonds in France, he was pursued there, and the securities were attached. Subsequently, by agreement, for economic reasons, I believe, the whole matter was retransferred to England. That is as near as I remember. Of course I was not there and took no part in it, and only gather it up now from hearsay.

Q. 43. General, did you, at the time of these several proceedings taken by you, acquaint H. P. Wakelee with them?

A. Both Cornwall and Wakelee were thoroughly aware of everything that went on, and took a lively interest in the pursuit — Mr. Davis.

Q. 44. Did you fully advise them of the effect of those proceedings?

A. Yes, as fully as we generally do our clients. Both of them were intelligent men, Mr. Cornwall particularly so, and they understood the business as well as I did.

Q. 45. In your answer to Q. 37 you have spoken of a reversal of the supreme court of California of an order of Judge Dwinelle. Will you please look at the document now shown you, purporting to be transcript on appeal and certified copy of remittitur in the case of Wakelee *vs.* Davis in the supreme court of California, and state whether they are the proceedings that you have referred to in your answer to said Q. 37?

A. I hold in my hand a transcript on appeal from the fifteenth district court to the supreme court of the State of California in the case of Wakelee *vs.* Davis, which is the transcript on appeal in the matter to which I have here alluded.

121 Complainant introduces in evidence exemplified copies of the transcript and remittitur above referred to, which are marked "Complainant's Exhibit Transcript." (*Infra*, p. 56.)

Mr. BARROWS: I object to the introduction in evidence of this transcript and remittitur on the ground that it is impertinent and irrelevant and immaterial, it relating to transactions and proceedings of the State court subsequent to the discharge in bankruptcy.

Q. 46. Do you know of any other matters or things to the interest of the complainant in this suit; if so, will you please testify to the same as if you were particularly interrogated thereto?

A. I know of nothing, except that the English action brought by H. P. Wakelee was discontinued without a trial upon the merits, and the reason it was discontinued was that the expense of the litigation so far had been so great that it did not seem that the amount that we would realize if we were completely successful in the action would equal the expense of recovery.

Mr. BARROWS: I object to the answer, except to the words "I know of nothing," and move to strike it out on the ground that it is irrelevant and impertinent to any issue in this case.

W. H. L. BARNES.

(Examination continued, in conformity with agreement of counsel, until Monday, December 16, 1889, at half past two o'clock p. m.)

122 MONDAY, *December 16th*, 1889.

Present: Mr. Bayne and Mr. Coogan, of counsel for complainant; Mr. Barrows, of counsel for respondent.

Examination-in-Chief of Joseph Naphtaly on Behalf of Complainant.

(By Mr. BAYNE:)

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Joseph Naphtaly; my age, forty-seven years; I reside in San Francisco, and am by profession a practising attorney-at-law.

Q. 2. How long have you been engaged in your profession as an attorney-at-law?

A. Since 1865.

Q. 3. In this city?

A. Yes, sir.

Q. 4. Did you know Henry P. Wakelee in his lifetime, Mr. Naphtaly?

A. I knew Henry P. Wakelee in his lifetime; yes, sir.

Q. 6. Are you acquainted with Pierre B. Cornwall, of this city and county?

A. Yes, sir; I know him.

Q. 7. Mr. Naphtaly, did you act in any of those years as attorney and counsellor for A. P. Wakelee?

A. I acted as such at a certain time. I don't know the exact year. I think it was in 1875 or 1876.

Q. 8. In what matter?

A. In connection with General Barnes, as attorney for Cornwall and Wakelee in the bankruptcy proceedings of Erwin Davis that were then pending in the United States district court of this State.

Q. 9. Was the said Erwin Davis, bankrupt, the defendant in this case?

123 A. That I don't know.

Q. 10. Who was his regular attorney in the matter in bankruptcy?

A. Judge Robert Thompson.

Q. 11. Anybody else appear for him?

A. In the bankruptcy case, I think, J. P. Hoge, a present judge of the superior court of this city and county, assisted Judge Thompson in certain matters in that case, but I don't know whether he acted throughout the entire case.

Q. 12. Do you recollect any one else at any time who appeared in that proceeding as attorney for the bankrupt?

A. I have an idea that Caleb Dorsey, of Tuolumne county, appeared for him, but I am not sure.

Q. 13. Do you know what became of Mr. Wakelee?

A. Yes, sir; I know he is dead.

Q. 14. Did you act as attorney for H. P. Wakelee in said matter of bankruptcy, in reference to an application for leave to sue the bankrupt?

A. I cannot remember unless I look at the record.

Q. 15. Did you act as counsel for H. P. Wakelee in a certain proceeding in said court to oppose the discharge in bankruptcy of said bankrupt?

A. In connection with General Barnes, I did.

Q. 16. Please look at the paper now shown you, endorsed: "563. U. S. district court. In the matter of Erwin Davis, bankrupt. Opposition of H. P. Wakelee to bankrupt's discharge. Filed February 23rd, 1876, at 3.15 p. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk. J. Napthaly and Delos Lake, solicitors for contestant," a certified copy of which document is in evidence herein, marked "Complainant's Exhibit Opposition" (bill, p. 23,) and state whether that embodies the proceeding taken by you and Mr. Barnes, as counsel in opposition to the application.

A. This paper is an opposition to the discharge of Erwin
124 Davis written by my clerk, Mr. I. P. L. Brandt, now an attorney of this city, but my clerk then. It is signed by myself and Mr. Barnes, as solicitors for contestant. I drew the opposition and gave my clerk the paper to copy, and this is his copy.

Q. 17. Did you represent the H. P. Wakelee in a certain proceeding taken in said matter in said court to set aside the objection of H. P. Wakelee to the discharge of the bankrupt and to dismiss his proofs of debt?

A. By reference to the petition now handed to me, I see that these papers were served upon me as one of the attorneys in the case by Judge Robert Thompson, and service admitted by my clerk in my name and in the name of General Barnes. The admission of service is in my clerk's writing. I also hold in my hand a certified copy of that document, which is marked with the title of this case, "Complainant's Exhibit Petition to Dismiss." I make the same answer with reference to the petition for an order of court to cancel the proof of debt made in the Erwin Davis case by Mr. Cornwell and served upon me. The admission of service is made in the name of General Barnes and myself by my clerk. I hold in my hand a certified copy of that paper, marked with the title of this case, "Complainant's Exhibit Petition to Dismiss." (Bill, p. 26.)

Q. 18. Please look at the paper now shown you, endorsed "563. U. S. district court. In the matter of Erwin Davis, bankruptcy. Stipulation and agreed statement of facts. Filed August 15, 1876, at 11.20 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk," and state if you recognize the signatures thereto, a certified copy of which paper is also handed to you, which is introduced in evidence in this case and marked "Complainant's Exhibit Facts." (*Infra* p. —)

A. I recognize the signatures of "Joseph Napthaly" and "W. H. L. Barnes" as being in the handwriting of my clerk, Mr. Brandt, and signed by him under authority of General Barnes and myself.

125 The signatures of J. P. Hoge, Judge Thompson and Caleb Dorsey, I don't know in whose handwriting they are, although the writing looks like that of Judge Thompson.

Q. 19. Was that document submitted to the court on a motion to dismiss?

A. It was.

Q. 20. Was the motion submitted for decision upon the statement of facts contained in it after argument?

A. I believe it was. By reference to the document, I find that to be the fact. The endorsement upon the back of this paper, "and agreed statement of facts," is in the handwriting of Mr. Grimwood, the deputy clerk of the court at that time.

Q. 21. Were you present in court during the argument of said motion to dismiss?

A. I was.

Q. 22. Who else was present as counsel?

A. I recollect only Judge Hoge, Judge Thompson, General Barnes, and myself.

Q. 23. Will you please state who these gentlemen, respectively, represented?

A. Judge Thompson was the chief counsel for Mr. Davis. Judge Hoge was, as I understood, an assistant of Judge Thompson's in that matter. General Barnes and myself appeared for the creditors, Cornwall and Wakelee.

Q. 24. Were these motions of the bankrupt, Davis, to dismiss the objections of Cornwall and Wakelee heard together?

A. I believe they were heard together. They were based upon the same statement of facts, and I believe they were heard together.

Q. 25. Will you please state what was said by the counsel for Davis on the argument of the motion in open court, so far as you can recollect?

A. That is too much of a question to ask me at this time of life. I remember, of course, some parts of it. Judge Hoge ap-

126 peared in the case and made the chief argument in the case—that is, Judge Thompson yielded to Judge Hoge in making the argument of the case. I remember Judge Hoge being there with an unusually large number of books. I think Judge Thompson also argued the matter. I said something in reply, and I believe I filed some authorities in the case or, rather, I filed a reply to the authorities cited by Judge Hoge. I have looked over my papers in my office and have had my clerk make a diligent search for that brief, but I find nothing there; but unquestionably I must have said something in reply to their motion, because it was something new at the time. I supposed bankruptcy proceedings did not change the character of indebtedness, even if judgment was recoverd afterwards. I have not been able to find any copy of my brief among my papers. I only find one single paper among my papers relating to that matter, and that is a list of the creditors. Since the time of

the argument of that motion I have moved my office, and am associated with other gentlemen as attorneys, and that brief may still be in existence, together with the other papers, but I have not been able to find them, although I have looked for them wherever I was likely to find them.

Q. 26. Will you please state the substance, as far as you can recall it, of what was said by counsel for the bankrupt, Davis, on the argument of that motion to dismiss?

A. I can tell you only generally what was claimed. The motion to dismiss was made upon the ground that these gentlemen had procured a judgment and had taken themselves out of the jurisdiction of the bankruptcy court by trying to improve their condition, and that having done so—I believe it was claimed there was an attachment levied at that time upon some things somewhere, but I am not distinct in my recollection upon that subject; my best impression is that that was one of the points suggested—that these creditors had, by bringing the suit and attaching the property, taken
127 themselves out of the jurisdiction of the bankruptcy court voluntarily, and that they had no right to prevent Mr. Davis' discharge by reason thereof. We claimed, on the other hand, that it did not make any difference; that the debt had not been merged in the judgment so as to drive them out of the court, so to speak, and not allow them to participate in the proceeding against Davis. We were apprehensive that the discharge in bankruptcy would discharge the judgment debt just the same as it would have discharged the original debt as it existed at the time of filing the petition. Judge Hoge strenuously argued that that was not so; that the new judgments would not be discharged by the bankruptcy proceeding, and that we would lose nothing by it. That, in substance, according to my recollection, is what occurred in court at that time.

Mr. BARROWS: To that answer we object and move to strike it out on the ground that it is impertinent and irrelevant, in that the witness does not claim to remember what was said in that argument, but only gives vague impressions, which are founded upon his recollection of his view of the law at the time and as they looked at it at the time of the argument, and that the argument as he recites it is only an argument upon questions of law, and is therefore upon that ground irrelevant, impertinent, and immaterial.

Q. 27. Mr. Naphtaly, in view of the objection just interposed by counsel, will you please state, so far as you can, and confine your answer to what was stated in court by Judge Hoge on the argument in question.

A. Of course it is impossible for me to give all that was said or even the exact language of anything that was said. The petitions and papers on file show what was before the court; and when I say "it was claimed" I mean to say it was said by the moving
128 party that the motion made by them should be granted for the reason that the two creditors had taken themselves without the jurisdiction of the bankruptcy court; had brought suit and, I think, attached certain property of Erwin Davis, and that any dis-

charge obtained in a bankruptcy court would not discharge that judgment, and the creditors would not be effected by it.

Mr. BARROWS: We object to that answer and move to strike it out on the same grounds stated in the last preceding objection.

Q. 28. Do you know whether an order was subsequently entered upon the motion to dismiss?

A. I know Judge Hoffman decided the case, but I did not draw any order, because the order was not in my favor. The paper that you have just handed to me is a paper having the signature of Honorable Ogden Hoffman, district judge, appended thereto, and is, of course, the order that he signed in the matter. I have in my hand a certified copy of the said order, which is marked in this case "Complainant's Exhibit Cancellation." (Bill, p. 30.)

Q. 29. Referring to the order that you have just looked at, did H. P. Wakelee accept and acquiesce in said order?

A. He did. He certainly had to. There was no appeal taken from this order. It was perfectly satisfactory to General Barnes, under whose instructions I mainly acted in this case. I was only called into the case because he believed I had had more experience in bankruptcy proceedings than he had had. I was not the regular attorney for these gentlemen. General Barnes was.

Q. 30. Do you know whether H. P. Wakelee ever afterwards in any way appeared in said bankruptcy proceedings to oppose or set aside said discharge?

A. I don't know anything about it. My connection with these claims ended with that order.

129 Q. 31. Mr. Napthaly, will you please state why this decision on the motion was satisfactory to you and to General Barnes?

A. It was satisfactory to me because it was satisfactory to General Barnes, and to General Barnes it was satisfactory because he thought, as far as I recollect, that it was a pretty good thing to have a judgment against Erwin Davis, because he was a man of great talents and ability to make a great deal of money and a man of vast resources, and that decision suited him. It only suited me because I followed instructions.

Q. 32. Did you consider that after that order dismissing and setting aside the opposition of H. P. Wakelee gave you a valid judgment against Davis?

Mr. BARROWS: We object to that question on the ground that it is entirely immaterial, as it is asking for the opinion of the witness upon a question of law and not for a fact.

A. As far as Judge Hoffman's decision could make it, of course I didn't think he was right, but his decision certainly was final in that case, because no appeal had been taken from it.

Q. 33. Mr. Naphtaly, did you advise your clients as to the effect that this order would have upon their judgment?

A. No, sir; I did not. I don't know whether I ever spoke with them about it. I know General Barnes and I talked about the matter, and he let it rest where it was. He was willing to take

Judge Hoffman's decision in this matter as a matter in favor of his clients.

Cross-Examination of Joseph Naphtaly.

By Mr. BARROWS:

Q. 1. Mr. Naphtaly, you and Mr. Barnes did what you could to prevent the entry of this order by way of argument, did you not?

130 A. We did everything that was proper to be done.

Q. 2. It was argued fully on the side of Mr. Cornwall and Mr. Wakelee?

A. Argued thoroughly.

Q. 3. And everything that could be done on their behalf was done to avoid the entry of this order cancelling their proofs?

A. Everything that could be done in a court of justice to present both sides of the case was done both by Judge Thompson, who was very energetic in the matter, and ourselves, and the court decided against us.

Q. 4. How, then, is it that the final order was so satisfactory to General Barnes?

A. The final order was satisfactory because it had to be satisfactory, and General Barnes said, really, that the resources of Mr. Davis were so great and that he was a man of such great activity of mind and intellect that he would not rest a poor man, and that sooner or later he would get up in the world again and pay his debts, and Mr. Barnes was satisfied with the decision of the court.

Q. 5. Did you appear in any other matters in this bankruptcy proceeding of Davis's other than the application to cancel these proofs?

A. I think I did, but I don't remember.

Q. 6. Did you appear in the contest for discharge which came subsequent to this on behalf of other creditors?

A. I don't think so; I don't know; I don't remember.

Q. 7. Did you not appear as attorney for James G. Fair in opposition to the petition?

A. You are right. I now recollect that I did, and we got thrown out there on some ground or other; I don't know what it was.

Q. 8. Was not the application for discharge finally contested upon the specifications of opposition which you filed on behalf of James G. Fair?

131 (Question objected to by complainant and withdrawn.)

(By Mr. BAYNE:)

Q. 9. You were asked on cross-examination why you were satisfied with the order dismissing objection of the creditors. Was it the fact that all the creditors then before the court considered the judgments they had obtained in the State courts as valid?

A. Well, I can only answer that in the way I have stated before. The judgments were valid, but we had an idea that the discharge

in bankruptcy would discharge that judgment as well, but then the court decided otherwise. General Barnes, who was really the representative of these parties, was satisfied with the decision, and took no steps to set it aside, because he thought he could make his judgment at some future time. In fact, he was glad that he lost his case.

JOSEPH NAPHTALY.

Examination-in-chief of OGDEN HOFFMAN, on behalf of the complainant.

(By Mr. BAYNE:)

Q. 1. Judge, will you please state your age, your residence, and your occupation?

A. I am sixty-seven years of age; my residence is San Francisco, and I am United States district judge for the northern district of California.

Q. 2. How long have you been such judge?

A. Since February 28, 1851.

Q. 3. Will you please look at the papers now shown you, endorsed "563. In the U. S. district court. In the matter of Erwin Davis, bankrupt. Petition and notice of motion as to opposition of H. P. Wakelee. Filed March 18, 1876, at 11.55 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk. R. Thompson, attorney for bankrupt," a certified copy of which has been offered in evidence in this case with the deposition of General Barnes, marked "Complainant's Exhibit Petition to Dismiss," and state whether you presided on the decision of said motion, and whether the order now shown you, endorsed "U. S. district court. In the matter of Erwin Davis, bankrupt. Order cancelling proofs and setting aside opposition of H. P. Wakelee. Filed October 31, 1876, at 11.20 a. m. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk," a certified copy of which has been introduced in evidence in this case with the deposition of General Barnes, and marked "Complainant's Exhibit Order of Cancellation," and state whether that order was signed by you.

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(These documents printed at pp. 23–30 of bill.)

A. This motion was made in the district court before me. The order produced seems, from its endorsement, to be taken from the files of the court, and I recognize my signature to it. This notice of motion appears to have been taken from the files of the court. I cannot prove that. The motion was made before me, and I believe argued at the same time of the proceeding.

Q. 4. Will you please look at the paper now shown you, endorsed "563. U. S. district court, district of California. *In re* Erwin Davis, in bankruptcy. Notes of argument on motion to cancel proofs of debt and to dismiss specifications of opposition of P. B. Cornwall and H. P. Wakelee. Filed July 20, 1876. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk," which document has been identified by Southard Hoffman, Esquire, clerk of the court, in his depo-

sition in this matter, and marked for identification "Complainant's Exhibit Notes," and state whether the same is in your handwriting.

(*Infra*, p. 92.)

A. I have no present recollection of the authorities that were cited to me upon that argument, but I recognize my handwriting.

133 These notes were taken by me undoubtedly at the time—that is to say, I have no doubt it was at the time, because they could not have been taken otherwise. I have no recollection of it, but I recognize my handwriting. I find that these notes were filed and duly endorsed among the records of the court.

Q. 5. Can you say from the memorandum made by you who appeared before you in the argument?

A. I find here Colonel Hoge, a present judge of the superior court in this city and county, noted as counsel on one side, and Mr. Napthaly as the other. I presume that they must have appeared. I have no doubt of it. I have no doubt that they represented the respective parties, but I have no recollection of the matter.

Q. 6. Are you able to say what authorities were cited by Judge Hoge on the argument, refreshing your recollection by the paper now in your hands, and above referred to?

A. I have no recollection, refreshed or otherwise, but I observe that this is in my handwriting, and I have no doubt, from seeing my memoranda here, that those authorities were cited, but I cannot say that it refreshes my recollection, because my recollection is absolutely a blank on the subject. It is only as to this paper that I testify to, and my recognition of my own handwriting, together with the file on the face of this memorandum as it appears on the records of the court duly endorsed as "Notes of argument."

(A duly certified copy of the document last above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Notes." *Infra*, p. 92.)

Mr. BARROWS: We object to the introduction in evidence of that document, on the ground that it is impertinent, irrelevant,

134 and immaterial, that it is not sufficiently identified or connected with the case.

OGDEN HOFFMAN.

135 In the District Court of the U. S. for the District of California.

In the Matter of ERWIN DAVIS, in Bankruptcy.

The following facts are hereby stipulated to be correct and true:

1st. That the petition and schedules of Erwin Davis *was* filed Sept. 11th, 1869.

2nd. That he was adjudicated bankrupt by Register Bates, and who has since died, Sept. 30th, 1869.

136 3rd. That H. P. Wakelee made proof of debt November, 1869, and amended his proof July 6th, 1870.

4th. That P. B. Cornwall made proof of debt in Nov., 1869, and amended his proofs July 6th, 1870.

5th. That H. P. Wakelee filed petition to be allowed to bring action in State courts June 28th, 1873.

6th. That P. B. Cornwall filed a similar petition July 25th, 1872.

7th. That the court granted the orders asked for in said petitions.

8th. That after said orders were made the said Wakelee and Cornwall commenced actions against Davis in the State courts and obtained judgments for the amounts sued for, and that they both subsequently brought suits on said judgments in France, and in said actions in France caused property to be attached. These actions have been removed to England by consent of parties, and are still pending. The judgments were obtained in California, and actions commenced in France prior to the filing of petition for discharge.

9th. Petition for discharge, filed Dec. 23rd, 1875.

10th. Both Wakelee and Cornwall filed opposition to the petition for discharge without cancellation of their judgments or the dismissal of their actions in France, and subsequently a motion
137 was made to expunge the proof of debt and dismiss the opposition of both.

JOS. NAPTHALY AND
W. H. L. BARNES,
Solicitors for Opposing Creditors.
J. P. HOGE,
R. THOMPSON,
CALEB DORSEY,
Att'ys for Erwin Davis.

138 Here were introduced in evidence duly certified copies of the following documents:

Exhibit "Leave," printed as Exhibits A & B, bill of complaint.

Exhibit "Opposition," printed as Exhibit C, bill of complaint.

Exhibit "Petition to Dismiss," printed as Exhibits D & E, bill of complaint.

Exhibit "Cancellation," printed as Exhibit F, bill of complaint

139 U. S. Circuit Court, S. Dist. of N. Y.

WAKELEE
v.
DAVIS. } No. 4111.

COMPLAINANT'S EXHIBIT TRANSCRIPT. S. C. H., Commissioner.

No. —.

In the Supreme Court of the State of California.

HENRY P. WAKELEE, Plaintiff and Appellant,
vs.
ERWIN DAVIS, Defendant and Respondent.

Transcript on Appeal from the Fifteenth District Court.

W. H. L. Barnes, attorney for appellant; C. Dorsey, attorney for respondent.

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141 In the Supreme Court of the State of California.

Complaint.

In the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

HENRY P. WAKELEE, Plaintiff,
vs.
ERWIN DAVIS, Defendant.

The complaint of Henry P. Wakelee, plaintiff in this action, against Erwin Davis, defendant herein, respectfully shows to the court and alleges as follows:

First. That on or about the twenty-sixth day of August, in the year 1869, at the city and county of San Francisco, State of
142 California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following—that is to say:

"$1,804.65. SAN FRANCISCO, *August* 26, 1869.

"On the 25th day of September, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, eighteen hundred and four $\frac{65}{100}$ dollars, with interest from date at the rate of one per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof, or of the interest due thereon, has been paid.

And, for a further and separate cause of action against said defendant, the plaintiff alleges and shows to the court as follows:

That on or about the twenty-sixth day of August, in the year

1869, at the city and county of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following—that is to say:

143 "$1,965. SAN FRANCISCO, *August* 26, 1869.

"On the 25th day of October, 1869, at 3 o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof, or of the interest due thereon, has been paid.

And, for a further and separate cause of action against said defendant, the plaintiff alleges and shows to the court as follows:

That on or about the twenty-sixth day of August, in the year 1869, at the city and county of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following—that is to say:

"$1,965. SAN FRANCISCO, *August* 26, 1869.

"On the 24th day of November, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of
144 H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

And for a further and separate cause of action against said defendant the plaintiff alleges and shows to the court as follows:

That on or about the twenty-sixth day of August, in the year 1869, at the city and county of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following—that is to say:

"$1,965. SAN FRANCISCO, *August* 26, 1869.

"On the 24th day of December, 1869, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Govern-

ment of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

145 And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

And for a further and separate cause of action against said defendant the plaintiff alleges and shows to the court as follows:

That on or about the twenty-sixth day of August, in the year 1869, at the city and county of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following—that is to say:

"$1,965. SAN FRANCISCO, *August* 26, 1869.

"On the 23d day of January, 1870, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Government of the United States, I promise to pay to the order of H. P. Wakelee, at the Bank of California, in this city, nineteen hundred and sixty-five dollars, with interest from after due at the rate of — per cent. per month until paid, payable monthly, both principal and interest payable in the like gold coin.

"(Signed) ERWIN DAVIS."

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

146 And for a further and separate cause of action against said defendant the plaintiff alleges and shows to the court as follows:

That on or about the eighth day of September, in the year 1869, at the city and county of San Francisco, State of California, the said defendant, Erwin Davis, made his certain promissory note in writing in the words and figures following—that is to say:

"SAN FRANCISCO, *September* 8, 1869.

"On demand I promise to pay to H. P. Wakelee or order six thousand and fifty-five $\frac{35}{100}$ dollars in gold coin, with interest from date at the rate of one per cent. a month.

"$6,055.35.

"(Signed) ERWIN DAVIS."

[U. S. internal revenue stamps, $3.05.]

And then and there, for value received, delivered the said promissory note to the plaintiff, who thereby became and ever since has been and now is the owner and holder thereof.

That no part thereof or of the interest due thereon has been paid.

Wherefore the plaintiff demands judgment against the said defendant for the sum of fifteen thousand seven hundred and twenty dollars, and with interest on $1,804.65 parcel thereof from August 26, 1869, at the rate of one per cent. per month, and with interest on $1,965 parcel thereof from October 25, 1869, at the rate of
147 ten per cent. per annum, and with interest on $1,965 parcel thereof from November 24, 1869, at the same rate, and with interest on $1,965 parcel thereof from December 24, 1869, at the same rate, and with interest on $1,965 parcel thereof from January 23, 1870, at the same rate, and with interest on $6,055.35 parcel thereof from September 8, 1869, at the rate of one per cent. per month; that the same be decreed and ordered to be paid in gold coin of the United States, and that plaintiff may recover his costs and disbursements in this action.

WM. H. L. BARNES,
Plaintiff's Attorney.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Henry P. Wakelee, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

H. P. WAKELEE.

Subscribed and sworn to before me this 19th day of July, A. D. 1873.

[SEAL.] F. O. WEGENER,
Notary Public.

(Endorsed: Filed July 19, 1873.)

148 (Title of Court and Cause.)

Summons.

The people of the State of California send greeting to Erwin Davis, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fifteenth judicial district of the State of California in and for the county of San Francisco and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within the county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover in gold coin of the United States the sum of $15,720, with interest thereon, alleged to be due to plaintiff from defendant upon and by reason of said defendant's

six promissory notes delivered to said plaintiff, as particularly set forth in the complaint on file herein, besides costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will take judgment against you in gold coin for said sum of $15,720, with interest and costs as aforesaid.

149 Given under my hand and seal of the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] WILLIAM HARNEY, *Clerk*,
By H. W. KIND, *Deputy Clerk*.

(Endorsed: Filed August 1, 1873.)

(Title of Court and Cause.)

Affidavit for Publication of Summons.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss*:

Henry P. Wakelee, being duly sworn, says that he is the plaintiff in the above-entitled action; that the complaint in said action was filed with the clerk of said court on the 19th day of July, 1873, and summons thereupon issued; that said action is brought to recover the sum of $15,720, due and unpaid by said defendant, Erwin Davis, to the plaintiff upon six promissory notes made by said defendant and dated at the city of San Francisco on the 26th day of August, A. D. 1869, and the 8th day of September, 1869, as hereinafter expressed, and payable to the plaintiff or his order, with interest until paid, as follows—that is to say:

150

Dated August 26, one due September 25, 1869, with interest from Aug. 26, 1869, for	$1,804 65
Dated August 26, one due October 25, 1869, with interest from that date, for	1,965 00
Dated August 26, one due November 24, 1869, with interest from that date, for	1,965 00
Dated August 26, one due December 24, 1869, with interest from that date, fore	1,965 00
Dated August 26, one due January 23, 1870, with interest from that date, for	1,965 00
Dated September 8, one payable on demand, with interest from September 8, 1869, for	6,055 35
Together	$15,720 00

That this deponent has been informed and believes, and therefore alleges, the said defendant, Erwin Davis, resides out of the State of California, to wit, in the city and county and State of New York.

Wherefore deponent prays this honorable court for an order that

the service of the summons in this action may be made by publication thereof.

H. P. WAKELEE.

Subscribed and sworn to this 19th day of July, A. D. 1873, before me—

[SEAL.] F. O. WEGENER,
Notary Public.

(Endorsed: Filed July 28th, 1873.)

151 (Title of Court and Cause.)

Order for Publication of Summons.

Upon reading and filing the affidavit of the plaintiff and the complaint herein, and it satisfactorily appearing therefrom to me, the judge of the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, that the defendant, Erwin Davis, resides out of the State and cannot, after due diligence, be found therein, and it appearing from the affidavit aforesaid, and the complaint herein that a good cause of action exists in this action in favor of the plaintiff therein and against the said defendant, and that the said defendant is a necessary and proper party defendant thereto; and it further appearing that a summons has been duly issued out of said court in this action, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained and by the said affidavit made to appear, on motion of Wm. H. L. Barnes, Esq., attorney for the plaintiff, it is ordered that the service of the summons in this action be made upon the defendant by publication thereof in the Daily Evening Bulletin, a newspaper published at said city and county of San Francisco, hereby designated as the newspaper most likely to give notice to said defendant; that such publication be made at least once a week for two months.

And it further in like manner satisfactorily appearing to
152 me that the residence of said defendant is known to be at the city of New York, in the county of New York, in the State of New York, it is ordered that a copy of the summons and a certified copy of the complaint in this suit be forthwith deposited in the post office, postpaid, directed to said defendant at his said place of residence.

Dated San Francisco, July 28, A. D. 1873.

SAMUEL H. DWINELLE,
Judge of the District of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

(Endorsed: Filed July 30, 1873.)

(Title of Court and Cause.)

Proof of Deposit.

CITY AND COUNTY OF SAN FRANCISCO, } ss:
State of California, }

William O'Connell, of the city and county of San Francisco, being duly sworn, deposes and says that he is a white male citizen of the United States, over twenty-one years of age, and is competent to be a witness on the trial of the action in the above-entitled suit; that on the thirtieth day of July, one thousand eight hundred and seventy-three, deponent deposited in the post office of the city and county of San Francisco, in a sealed envelope, a copy of the sum-
153 mons and a certified copy of the complaint in this case, directed to the defendant, Erwin Davis, city, county, and State of New York, having prepaid the legal postage thereon.

WILLIAM O'CONNELL.

Subscribed and sworn to before me this thirty-first day of July, A. D. 1873.

[SEAL.] F. J. THIBAULT,
Notary Public.

(Endorsed: Filed July 31, 1873.)

(Title of Court and Cause.)

Affidavit of Publication.

SAN FRANCISCO, *November* 11, 1873.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

A. C. Bonnell, of the said city and county, being duly sworn, says that he is a white male citizen of the United States; that he is over twenty-one years of age and is competent to be a witness on the hearing of the matters mentioned in the annexed summons; that he has no interest whatsoever in the case mentioned therein, and that he is the principal clerk of the printers and publishers of the Daily Evening Bulletin, a newspaper which is published daily (Sundays and holidays excepted) in said city and county, and has charge of all the advertisements in said newspaper, and that the summons
154 in the case of Henry P. Wakelee, plaintiff, *vs.* Erwin Davis, defendant, of which summons the following is a printed copy:

"In the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

"HENRY P. WAKELEE, Plaintiff,
vs.
"ERWIN DAVIS, Defendant.

"Action brought in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

"The people of the State of California send greeting to Erwin Davis, defendant:

"You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons if served within this county, or if served out of this country, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

"The said action is brought to recover, in gold coin of the United States, the sum of $15,720, with interest thereon, alleged to be due to plaintiff from defendant upon and by reason of said defendant's six promissory notes delivered to said plaintiff, as particularly set forth in the complaint on file herein, besides costs of suit.

155 "And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will take judgment against you in gold coin for said sum of $15,720, with interest and costs as aforesaid.

"Given under my hand and seal of the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-three.

"[SEAL.] WILLIAM HARNEY, *Clerk*,
"By H. W. KIND, *Deputy Clerk*.

"W. H. L. BARNES,
"Attorney for Plaintiff."

Has been published every Wednesday for two successive months in the above-named newspaper, commencing (first insertion) Wednesday, July 30, 1873, and ending (last insertion) Wednesday, October 1, 1873 (ten insertions); and further sayeth not.

A. C. BONNELL.

Subscribed and sworn to this 11th day of November, 1873, before me—

[SEAL.] SAMUEL S. MURFEY,
Notary Public.

(Endorsed: Filed Nov. 11, 1873.)

156 *Certificate of Secretary of State.*

STATE OF CALIFORNIA, DEPARTMENT OF STATE,
SACRAMENTO, *Aug.* 8, 1873.

I, Drury Melone, secretary of the State of California, do hereby certify that on the 8th day of August, 1873, there was received and filed in this office and duly entered and indexed in the "Register of Absent Defendants" a duly certified copy of the order of publication of summons; also a copy of the summons and a copy of the newspaper containing the publication thereof in the case of H. P. Wakelee *vs.* Erwin Davis, in the district court of the fifteenth judicial district, held in and for the county of San Francisco, State of California, and that the following is the name of the defendant as to whom publication of summons was directed to be made: Erwin Davis.

Witness my hand and the great seal of State, at office, in Sacramento, California, the 8th day of August, 1873.

[SEAL.]

DRURY MELONE,
Secretary of State.
H. H. RUSSELL, *Deputy.*

(Endorsed: Filed August 18, 1873.)

157 (Title of Court and Cause.)

Judgment.

In this cause, on motion of Wm. H. L. Barnes, Esquire, of counsel for plaintiff, and upon due proof of the service upon the defendant of the process issued herein that the time for answering has expired, and that the said defendant has failed to appear, answer, or demur—

Ordered that the default of the defendant for failure to answer be, and the same is hereby, entered.

Whereupon James H. Dane was sworn and examined as a witness on behalf of plaintiff, and the court orders that judgment be drawn and entered herein in favor of plaintiff and against defendant for the sum of $22,760.26 in United States gold coin.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that H. P. Wakelee, plaintiff, have and recover from Erwin Davis, defendant, in United States gold coin, the sum of twenty-two thousand seven hundred sixty and twenty-six one-hundredth dollars, with interest thereon from the date hereof at the rate of seven per cent. per annum till paid, together with said plaintiff's costs and disbursements incurred herein, amounting to *to* the sum of forty-nine ($49) dollars.

Judgment recorded November 18th, A. D. 1873, "C," 727.

158 Judgment-roll, comprising and consisting of the whole of the foregoing, filed November 18, 1873.

(Title of Court and Cause.)

Notice of Motion to Vacate Judgment.

To H. P. Wakelee and his attorney:

Take notice that the defendant in this action will, on Friday, the 13th day of April, A. D. 1877, at the opening of the court on that day, make a motion in open court to vacate and set aside the judgment of this court heretofore rendered in this action on the 13th day of November, A. D. 1873, for twenty-two thousand seven hundred and sixty-nine dollars, with forty-nine dollars costs, entered and recorded in Judgment Book C, page 727, and to permit the defendant in this action to plead his discharge in bankruptcy in bar of the original debt on which this action was founded.

Defendant will also make a motion for a perpetual injunction and stay of execution in this action.

These motions will be made in the court-room of said court at the time hereinbefore stated, or as soon thereafter as counsel can be heard, on the following grounds:

1st. That the judgment is null and void for the reason that the service of summons was by publication, and that the affidavit of
159 plaintiff for publication was insufficient to warrant the issuance of the order of the publication of the summons or to sustain the judgment.

2d. That the judgment is void for the further reason that prior to the commencement of this action the defendant was bankrupt, and on or about the 11th day of September, A. D. 1869, he filed his petition in the district court of the United States for the district of California, in the city of San Francisco and State of California, for the benefit of the bankrupt laws of the United States, and was, on or about the 30th day of September, A. D. 1869, duly adjudicated a bankrupt.

That after the adjudication of bankruptcy of defendant plaintiff in this action made proof of his debt against the defendant and filed said proof of debt in the United States district court or with the register thereof; that by the proving of the debt in the bankruptcy proceeding the plaintiff waived all right of action against defendant; that after filing said proof of debt plaintiff commenced this action and obtained this judgment while said proceedings were still pending, and that this court had no jurisdiction of the subject-matter of the action nor of the person of the defendant during the pendency of the proceedings in bankruptcy.

3d. That the defendant, on or about the 6th day of March, A. D. 1877, was duly discharged from all his debts which were proven or which were provable in bankruptcy, and that his discharge is a bar to both the original debt and the judgment in this action.

160 4th. That the plaintiff has commenced suit against defendant in France on the judgment in this action, and is endeavoring to enforce it against property acquired since his adjudication in bankruptcy.

These motions will also be made on the affidavit of Caleb Dorsey, a copy of which will be served with this notice of motion.

CALEB DORSEY,
Att'y for Erwin Davis.

(Endorsed: Filed April 12, 1877.)

(Title of Court and Cause.)

Affidavit of Caleb Dorsey, Attorney for Defendant.

(Accompanying the preceding notice.)

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Caleb Dorsey, being duly sworn, deposes and says that he is the attorney of Erwin Davis, the defendant in this action, and that he, the said Davis, is at present absent from the State of California and is in the State of New York.

Affiant further states that the complaint in this action was filed on or about the 19th day of July, A. D. 1873.

That there was no personal service of summons on the defendant.

161 That service of summons was made by publication of the summons, and that a copy of the affidavit of plaintiff for the order of publication of summons is hereto attached and made a part of this affidavit, and that judgment was rendered by default on or about the 13th day of November, A. D. 1873, for the sum of $22,760.26, gold coin, with $49 costs of suit, entered and recorded in Judgment Book C, page 727.

Affiant further states that on or about the 11th day of September, A. D. 1869, and prior to the commencement of said suit, the said Erwin Davis became bankrupt and filed his petition for the benefit of the bankrupt laws of the United States in the district court of the United States for the district of California, in the city of San Francisco, in the State of California, and was duly adjudged a bankrupt on or about the 30th day of September, A. D. 1869.

That after said adjudication of bankruptcy, and long prior to the commencement of this action, plaintiff made proof of his debt against said defendant and filed said proof of debt in said United States district court or with the register thereof.

Affiant further states that prior to the commencement of said suit the United States district court gave permission to plaintiff to bring said action pending the proceedings of bankruptcy and before said proceedings had ended without a discharge and before the discharge had been refused, and that said proceedings in bankruptcy have since ended by the said court granting to said defend-

162 ant a full and complete discharge of all his debts, proven and provable, in bankruptcy, and that said discharge was granted on or about the — day of ——, 1877.

Affiant further states that said plaintiff, as he has been informed and believes, has commenced suit in France on said judgment and

is now endeavoring to enforce it against property acquired since the adjudication of bankruptcy.

That affiant has obtained this information from said Erwin Davis, and also from W. H. L. Barnes, the attorney of plaintiff; that he has heard both of them state that such suit has been commenced, and that this affiant believes that said suit is still undetermined and pending.

Affiant further states that at the time and long prior to the filing of his petition in bankruptcy the said Erwin Davis was a resident of the State of California.

CALEB DORSEY.

Subscribed and sworn to before me this 9th day of April, 1877.

SAMUEL S. MURFEY,
Notary Public.

[SEAL.]

(Title of Court and Cause.)

Affidavit for Publication of Summons.

(Accompanying the preceding notice.)

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Henry P. Wakelee, being duly sworn, says that he is the
163 plaintiff in the above-entitled action; that the complaint in said action was filed with the clerk of said court on the nineteenth (19th) day of July, 1873, and summons thereupon issued; that said action is brought to recover the sum of $15,720, due and unpaid by said defendant, Erwin Davis, to the plaintiff upon six promissory notes made by said defendant and dated at the city of San Francisco on the 20th day of August, A. D. 1869, and the 8th day of September, 1869, as hereinafter expressed, and payable to the plaintiff or his order, with interest until paid, as follows, that is to say:

Dated August 26, one due September 25, 1869, with interest from Aug. 26, 1869, for	$1,804 65
Dated August 26, one due October 25, 1869, with interest from that date, for	1,965 00
Dated August 26, one due November 24, 1869, with interest from that date, for	1,965 00
Dated August 26, one due December 24, 1869, with interest from that date, for	1,965 00
Dated August 26, one due January 23, 1870, with interest from that date, for	1,965 00
Dated September 8, one payable on demand, with interest from September 8th, 1869, for	6,055 35
Together	$15,720 00

That this deponent has been informed and believes and therefore

alleges the said defendant, Erwin Davis, resides out of the
164 State of California, to wit, in the city and county and State of New York.

Wherefore deponent prays this honorable court for an order that the service of the summons in this action may be made by publication thereof.

H. P. WAKELEE.

Subscribed and sworn to before me this 19th day of July, A. D. 1873.

F. O. WEGENER,
Notary Public.

Endorsed: Filed July 28th, 1873.

All objections as to time of service being waived, service of copy of the foregoing notice of motion and affidavit admitted this 11th day of April, 1877.

W. H. L. BARNES,
Att'y for Pl'ff.

(Title of Court and Cause.)

Opinion of the Court.

The defendant moves to set aside the judgment entered in this action, and that he be permitted to plead his discharge in bankruptcy in bar of the original debt on which this action was brought, and also for a perpetual injunction and stay of execution.

Erwin Davis, the defendant in this action, being a bankrupt, on the 11th day of September, 1869, filed his petition for the benefit of the bankrupt laws of the United States in the district court of the United States for the district of California, and was, on the
165 30th day of September, 1869, adjudicated a bankrupt. Prior to the 19th day of July, 1873, the said United States district court gave the said plaintiff permission to bring this action, and the same was commenced on the day and the year last aforesaid. There was not any personal service of summons therein on the said defendant, but service thereof was made by publication, and on the 13th day of November, 1873, judgment was rendered by default against the said defendant for the sum of $22,760.26 damages, payable in gold coin, and $49 costs. After the said adjudication of bankruptcy and long prior to the commencement of this action the said plaintiff made proof of the indebtedness sued upon in this action in the said United States district court or with the register thereof.

The proceedings in bankruptcy in the United States district court have ended and culminated on the 6th day of March, 1877, by the granting therein to the said defendant a full and complete discharge of all his debts, proven and provable, in bankruptcy.

"A discharge in insolvency of a debt is equally a discharge of a judgment on that debt and the costs rendered between the time of filing the petition and schedule and the time of final discharge."

"The judgment is simply the original debt in a new form."

"Relief in such a case may also be granted by a perpetual stay

of execution, or by setting it aside, or by any other requisite to protect the rights of the parties."

166 "The remedy at law being ample, equity will not aid."

Imlay *vs.* Carpentier, 14 Cal., 173.

Applying the principles of the case cited to the motion under consideration, the defendant is entitled to an opportunity to avail himself of the defense he has shown *prima facie* himself to have to the judgment and the cause of action on which it was predicated. The motion is in time, as good cause is shown why the motion was not made before the adjournment of the term in which the judgment was entered; the motion could not be made at that term, for the foundation of it, the final discharge in bankruptcy, was not granted until March last.

Mahoney *vs.* Mahoney, 51 Cal., 118.

I do not deem it necessary to examine the other points made by the defendant. I have been referred by counsel for the plaintiff to the case of McDonald *vs.* Davis, recently decided by the Supreme Court. It was not a case parallel with the one under consideration. In that case a final discharge in bankruptcy had not been granted, and, as I understand, was decided from the bench upon the one point that that tribunal would not review the action of the United States district court in granting an order permitting a creditor of a bankrupt to commence an action to recover his claim.

The defendant's motion is granted to the extent of setting
167 aside and vacating the judgment and permitting him to plead his discharge in bankruptcy.

DWINELLE, *Judge*.

(Endorsed:) Filed July 10, 1877.

(Title of Court and Cause.)

Order to Vacate Judgment.

The defendant's motion to vacate and set aside the judgment heretofore rendered and entered herein having heretofore been heard, submitted, and taken under advisement, and now due consideration having been had—

It is ordered that said motion be, and the same is hereby, granted and allowed to the extent of vacating and setting aside said judgment and allowing defendant to plead his final discharge in bankruptcy; to which ruling and decision of the court plaintiff, by his attorney, at the time excepted.

DWINELLE, *Judge*.

Tuesday, July 10th, 1877.

(Title of Court and Cause.)

Notice of Appeal.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State from the

order vacating the judgment therein made and entered in
168 the said district court on the 10th day of July, 1887, in favor of the defendant in said action and against said plaintiff, and from the whole thereof.

Dated this 30th day of August, 1877.

Yours, etc.,

W. H. L. BARNES,
Att'y for Plaintiff and Appellant.

To the clerk of said district court and Caleb Dorsey, Esq., att'y for defendant.

(Endorsed: Filed August 30, 1877. Received a copy of the within this 30th day of August, 1877. Caleb Dorsey, att'y for defendant.)

169 Service accepted by copy this — day of —— 187–.

——— ———,
Attorney for Respondent.

170 & 171 WAKELEE *vs.* DAVIS. } No. 4411.

COMPLAINANT'S EXHIBIT NOTES.

U. S. Circuit Court, S. Dist. of N. Y.

S. C. H., Commissioner.

In re Erwin Davis

Hoge

In re Williams

1 Am. L. Times R. 107-113. 2 N. B. R.
6 N. B. R. 388.

102 Mass., 472
27 Maine, 441
15 Gray, 547

Walcott *vs.*
In re Montgomery
3 B. R. 426
5 B. R. 353

Napthaly

(Endorsed:) Filed July 20th, 1876. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

172 *Examination-in-Chief of Robert Thompson, on Behalf of Respondent:*

(By Mr. BARROWS:)

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Robert Thompson; my age, sixty-seven years; I reside in San Francisco, and am by occupation an attorney-at-law.

Q. 2. How long have you been such attorney?

A. About thirty years.

Q. 3. In this State?

A. Yes, sir.

Q. 4. Did you know the complainant, Pierre B. Cornwall?

A. No, sir; I did not know Mr. Cornwall.

Q. 5. Did you know H. P. Wakelee?

A. Yes, sir.

Q. 6. In or about the year 1869 and subsequent thereto?

A. Yes, sir; I knew him before that, and afterwards.

Q. 7. Were you acquainted with Erwin Davis about those times?

A. I was.

Q. 8. Did you act for him in any capacity; if so, what?

A. I did. I acted as his attorney in the bankruptcy proceeding in the United States district court for the district of California.

Q. 9. At what time?

A. My first consultations with him were, I think, in the first part of 1869. The petition was filed in September, 1869. I was
173 first employed by him in the matter at least six months before the filing of this petition.

Q. 10. You remained his attorney through all of those bankruptcy proceedings?

A. I did.

Q. 11. Do you remember proceedings had in that matter, wherein Pierre B. Cornwall and Henry P. Wakelee filed specifications of opposition to the discharge of Davis, and objection was made thereto on the part of Mr. Davis in the contest which ensued thereon?

A. I do.

Q. 12. Who acted with you as attorney for the bankrupt in those proceedings, if any one?

A. After about 1875, and when we were about to proceed with the petition for Davis' discharge, Judge Caleb Dorsey, from Tuolumne county, and Joseph P. Hoge were associated with me in the matter for Mr. Davis.

Q. 13. Were you present at the argument which ensued upon the motion to strike out those oppositions?

A. I was.

Q. 14. Will you state, as nearly as you can, what was said by counsel for the bankrupt in the argument of that question?

A. Do you mean the language they used?

Q. 15. Yes; the language that was used.

A. No, sir; I couldn't do that.

Q. 16. Well, will you give us, to the best of your recollection, the language that was used—the arguments used?

A. I can give you the general purport—the questions and their disposition—but I couldn't remember the language used.

Q. 17. Well, give it.

174 A. There were four oppositions filed to Mr. Davis' discharge by four different individuals. One by Mr. Cornwall, one by Mr. Wakelee, the complainants in these suits; another by E. A. Head, and the fourth by James G. Fair. Joseph Napthaly, who has testified in this case, was the attorney connected with the opposition in each one of the four cases. When the oppositions were filed I

examined into them and moved to set aside three out of the four on different grounds, but the grounds of the Wakelee and Cornwall oppositions were the same. The four specifications of opposition were identically alike—one seemed to be copied from the other verbatim. The Wakelee and Cornwall oppositions I moved to set aside on the ground that they had obtained a judgment in the district court of the State of California after the petition in bankruptcy had been filed, and that that judgment stood of record, the ground appearing in the paper itself. I drew it myself and filed it. I based the motion on a case decided by Judge Lowell in Massachusetts, found reported in the Fifth Bankruptcy Register, I think, on page 353, being entitled *In re* Gallison *et al.*, which was to the effect that a party having proved his debt in bankruptcy, and subsequently going into a State court and obtaining a judgment, could not file opposition or was not entitled to file and be heard in opposition to the bankrupt's discharge, unless he filed a stipulation that he would abide by a decision of the United States courts on the question of discharge; but if he filed that stipulation that he would discharge the judgments in case the bankrupt obtained his discharge in the United States courts, that he would allow them to remain. As I viewed the case at the time, it was to compel them to choose between remaining in the United States court and depending upon defeating Mr. Davis in his discharge or to get out of the United States court and take their chances in the State court under that judgment. As they had filed with their opposi-
175 tion no stipulation to satisfy their judgments in the State court, in my view they had no standing in the bankruptcy court and could not have unless the court permitted them afterwards to file such stipulation. No such stipulation was ever filed. On the hearing of my petition to dismiss their opposition and cancel their debt, Judge Hoge made the principal argument on the part of Mr. Davis. Mr. Dorsey read the stipulation as to facts, which stipulation has already been introduced in evidence herein, and I think made some short argument. General Barnes and Mr. Napthaly argued it on the other side. The facts covered by the stipulation were all conceded. There was no controversy as to facts. The question before the court was simply a legal question growing out of those facts. The question was an unsettled question, even under the old bankrupt acts before that of 1867. Some of the courts had held that judgments obtained on old debts that existed at the time of the filing of the petition in bankruptcy, on which judgments have been obtained, were discharged by a discharge in bankruptcy, and others had held the reverse, and the same was true under the act of 1867, at that time. Judge Hoffman in those cases held that they were not discharged, and therefore dismissed the oppositions.

176 Q. 18. Was there any argument upon that hearing with regard to the validity of the judgments in the State court independent of the bankruptcy proceedings?

A. I remember nothing of the kind. I do not think the question was raised at all before the court. I have no recollection of its being alluded to.

Q. 19. I will ask you, then, was the question raised by the attorneys for the complainants here on that hearing or by the attorneys for the bankrupt, as to whether these judgments were valid or invalid in the State court, independent of the bankruptcy proceeding?

177 A. I have no recollection of the validity of the judgments having been referred to in that argument. It was not a contested point in the case, as far as I recollect. My impression is that the validity of the judgments was assumed by all parties and by the court.

Q. 20. If that question had been raised and argued, you would have been likely to recollect it now, wouldn't you?

A. Oh, yes. I recollect every point that was made in the case.

Q. 21. What makes you think that the validity of the judgments was assumed, as you say, by all parties?

A. Merely the fact that I do not remember that it was argued at all or alluded to.

178–180 Q. 24. At the time of the decision of that contest with regard to striking out the opposition of Cornwall and Wakelee, was anything said by their attorneys with regard to that decision, and with regard to whether they would appeal from it or otherwise; if so, what?

A. There was some conversation. I had a conversation with Mr. Napthaly, and he said they were perfectly satisfied with the order of Judge Hoffman.

Q. 25. Do you think of anything else pertaining to the issues in this case which you have omitted? If so, please state.

A. I don't think of anything else.

R. THOMPSON.

Examination continued in conformity with agreement of counsel for the respective parties herein until Friday, December 20, 1889, at 2 o'clock p. m.

181 The plaintiff, Henry P. Wakelee, appealed to the supreme court of the State of California from the order of July 10th, 1877, of the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, granting defendant's motion to the extent of vacating and setting aside the judgment against him and allowing him to plead his final discharge in bankruptcy.

And the said order was reversed by the supreme court with costs February 5th, 1881, with an opinion, as follows:

"The judgment was recorded November 18th, 1873, and notice of the motion given April 12, 1877, on the authority of Bell *vs.* Thompson, 19 Cal., 706; Casement *vs.* Ringold, 26 Cal., 335; Sanchez *vs.* Carriaga, 31 Cal., 170, and Murdock *vs.* De Vries, 37 Cal., 527. The order is reversed."

It is admitted by defendant that complainant is the widow of Henry P. Wakelee, deceased, and is about to commence an action at law against the defendant to recover upon the judgment against the defendant recovered by H. P. Wakelee in the district court of

the fifteenth judicial district of the State of California, as alleged in the bill herein.

It is admitted by the defendant that the judgment entered by Henry P. Wakelee against Erwin Davis in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, as alleged in paragraph XIV of the bill of complaint as finally amended, was duly assigned for value by said Wakelee to Charles E. Laidlaw, February 9, 1881,
182 and by said Laidlaw, for value, to Angelica Wakelee, the complainant herein, Nov. 9th, 1886.

It is admitted by the defendant that the promissory notes described in the second paragraph of said bill of complaint as finally amended were assigned for value by said H. P. Wakelee to F. L. Marshall 21st February, 1882, and by said Marshall to Angelica Wakelee for value March 1st, 1886.

183 Then were introduced in evidence on the part of complainant the pleadings and proof of service in the action in the New York supreme court entitled Fielding L. Marshall, plaintiff, against Erwin Davis, defendant, and the supplemental complaint of Angelica Wakelee, as substituted plaintiff therein, and answer thereto, which showed that said action was begun by service of summons on said defendant in April, 1882, and was discontinued without trial by order of the court dated 17th of October, 1887, on payment by plaintiff, Angelica Wakelee, to the defendant of an extra allowance of $471.60 and costs, and disbursements of $173.45, in all $645.05. The documents were duly exemplified.

The action was brought on all the promissory notes described in the second paragraph of the bill of complaint herein, and the complaint set up assignments thereof for value to respective plaintiffs and demanded payment thereof with costs.

The answer, served in May, 1882, and amended answer, served in May, 1886, admitted the making of the notes, and that nothing had been paid on them; denied that the copies thereof set forth in the complaint were true copies, and denied that anything was due thereon to plaintiff; set up the statute of limitations as a defense; set up defendant's discharge in bankruptcy, obtained March 6th, 1877, in bar of action on said notes; denied that the notes were de-
184 livered for value; alleged that no consideration was given for the notes; denied the assignment on said notes for value, and that the plaintiff was the owner thereof.

Duly exemplified copies of the pleadings and judgment in a case in the high court of justice, Queen's bench division, wherein said Henry P. Wakelee was plaintiff and Erwin Davis was defendant, were introduced in evidence for complainant and were marked, respectively, Complainant's Exhibit English Case Pleadings and Judgment.

These documents showed that Henry P. Wakelee brought suit Oct. 22, 1875, against said Davis in said court in London, in England, to recover upon the judgment recovered by said Wakelee against said Davis in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, Nov.

18th, 1873, for the amount and as alleged in paragraph XIV of the bill of complaint herein, and also upon the promissory notes set forth in paragraph II of said bill of complaint, and the "statement of the claim" which was delivered 2nd Dec., 1875, set forth the making of said notes and the non-payment of any part of the principal or interest thereof, and set forth the recovery of said judgment, and that it was still in force and unsatisfied and demanded payment; that the "statement of defense" was delivered 7th Aug., 1876; delivered as amended 8th Dec., 1876; delivered as reamended 9th Feb., 1877; delivered as further amended 19th April, 1877; and set forth that said defendant did not admit that plaintiff had recovered said judgment; did not admit and denied that the court in which
185 it was said to be recovered had any jurisdiction to render said judgment; set forth that defendant had been adjudicated a bankrupt; that the said promissory notes had been proved in his bankruptcy proceedings as a claim; that the U. S. bankruptcy act forbade the creditor to issue execution on any such judgment as the one sued on; that such judgment, if recovered at all, was recovered after such adjudication; that before and at the time of and ever since the commencement of the suit in which said judgment was recovered the defendant was absent from and not a resident of the State of California, and that no process or summons in said suit was ever served upon him or ever came to his knowledge, and he had no knowledge of the action before judgment; that such judgment so recovered had no force and effect as a personal judgment against defendant and created no personal liability, nor had it any force and effect upon the property of defendant, except that within limits of said State.

It further set up a counter-claim, and on the 19th day of April, 1877, an amendment to said statement of defense was made in the following terms and words: "By way of further defense the defendant says that after the above-named statement of defense was delivered—that is to say, on or about the 7th of March, 1877—the defendant obtained from the said United States district court, having such jurisdiction in bankruptcy as aforesaid, his order of discharge in the said bankruptcy, and by the said bankruptcy
186 law of the United States the said order of discharge absolutely discharged and released the defendant from all debts and claims provable in his said bankruptcy and from the claims of the plaintiff in this action."

The "amended reply and defense to the counter-claim" delivered 4th Jan., 1877, and redelivered 1st June, 1877, as amended, set forth that the said judgment was recovered in an action upon the said note; that service of the summons in said action was duly made by publication, as authorized by statute of California, and had to be so made because defendant had departed and was wilfully absenting himself from the State, and that said judgment "was and is in full force and effect as a personal judgment and for all intents and purposes whatsoever;" that the U. S. district court, in re-bankruptcy matter of said Davis, had granted leave to sue on said notes and said Davis was not entitled, and could not have been, to a stay in the

action in State court, and that defendant Davis was estopped from defending against said judgment. The counter-claim was denied and the amendment as delivered June 1st, 1877, was in the following words:

"The plaintiff does not admit the statement made by the defendant by way of further defense in his statement of defense as reamended and says that the defendant did not on or about the 7th of March, 1877, obtain his order of discharge in the said bankruptcy, as he alleges; and the plaintiff further says that at the time the defendant alleges he obtained the said order of discharge the claims of the plaintiff in this action were not debts or claims provable in defendant's said bankruptcy nor were they subject to the operation of the bankruptcy laws of the United States in defendant's said bankruptcy, nor were they discharged or released by the said alleged discharge, but were excluded from the operation thereof and were not affected thereby."

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"The English case judgment" showed that the action in England was discontinued on payment by plaintiff of £155 19 11 costs 28th May, 1878.

188 United States Circuit Court, Southern District of New York.

ANGELICA WAKELEE }
v.
ERWIN DAVIS. }

Final Hearing in Equity.

Anson Maltby for the complainant, Henry A. Root and Thaddeus D. Kenneson for the defendant.

COXE, *J.*:

This bill is filed in aid of an action at law, which the complainant alleges she is about to commence, upon a judgment recovered against the defendant in a State court of California on the 18th of November, 1873.

Under the decision of the Supreme Court in Pennoyer *v.* Neff, 95 U. S., 714, this judgment was void, the summons having been served by publication only in an action *in personam*.

On the 6th day of March, 1877, the defendant obtained a discharge in bankruptcy from the United States court for the district of California, he having been adjudged a bankrupt by said court September 30, 1869. This discharge, if there were no estoppel, would be a bar to the debt represented by the judgment. (Boynton *v.* Ball, 121 U. S., 457.)

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The complainant contends that the defendant is estopped from denying the validity of the judgment and from relying upon the discharge as a defense, because in 1876, in the bankruptcy court, he obtained substantial benefits by contending that the judgment was valid and would not be barred by a discharge. The complainant insists that he should be held to the same position now,

and prays for an injunction restraining him from asserting the invalidity of the judgment and from relying upon his discharge as a defense thereto.

The cause has been twice before this court upon demurrer. (37 Fed. Rep., 280; 38 *id.*, 878.) The facts sufficiently appear in these decisions and need not be stated again. On the last demurrer the present bill was sustained. The court there decided the following propositions:

First. That the bill stated a cause of equitable cognizance.

Second. That having affirmed the validity of the judgment in the proceedings in bankruptcy, the defendant is now estopped to impeach it.

Third. That if the defendant pleads his discharge in the action at law about to be commenced, the plaintiff can avail herself of the facts constituting the estoppel, and, upon this branch of the case, is not in need of the assistance of a court of equity.

The propositions of law presented are the same now as on demurrer. Some testimony has been taken *pro* and *con.*, but, upon all important questions, it is substantially conceded that the legal aspects
190 of the cause remain unchanged.

It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided. It is the law of this court, to be followed upon similar facts until a different rule is laid down by the supreme court. A re-examination and discussion of the questions involved is therefore unnecessary, for the reason that the court is constrained to follow its former decision.

It follows that the complainant is entitled to a decree for an injunction restraining the defendant from asserting that the judgment of November 18, 1873, is not valid and does not still stand of record.

The complainant is entitled to costs.

Endorsed: United States cir. court, southern district of New York. Angelica Wakelee *vs.* Erwin Davis. Pierce B. Cornwall *vs.* Erwin Davis. Decision. Coxe, J. U. S. circuit court. Filed Jan. 7, 1891. John A. Shields, clerk.

191 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the post-office building in the city of New York on the 6th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Alfred C. Coxe, judge.

ANGELICA WAKELEE
versus
ERWIN DAVIS. } In Equity. No. 4411.

This cause having come on to be heard upon the bill of complaint herein, the answer thereto of the defendant, Erwin Davis; the

replication of the complainant to such answer, and the proof, oral, documentary, and written, taken and filed in said cause, and having been argued by counsel for the respective parties, and it appearing that the defendant, Erwin Davis, filed his petition in voluntary bankruptcy in the district court of the United States for the district of California on the 11th day of September, 1869, and was thereupon adjudged a bankrupt September 30th, 1869, and thereupon Henry P. Wakelee duly proved up in said proceedings certain debts or claims against said Erwin Davis due from said Davis to said Henry P. Wakelee upon certain promissory notes; that said district court of the United States, by an order entered July 8th, 1873, granted
192 leave to said Henry P. Wakelee to commence an action against said Erwin Davis for the recovery of said claims;

That said Henry P. Wakelee, as plaintiff, July 19th, 1873, commenced such action upon said promissory notes against said Erwin Davis as defendant in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco by publication only of the summons;

That on the eighteenth day of November, 1873, in said action, without any personal service of summons upon or any appearance by said Erwin Davis of any proceedings by attachment or *in rem* therein, a judgmen- was given or made by and in said district court of the fifteenth judicial district in favor of said Henry P. Wakelee and against said Erwin Davis, by the terms of which judgment it was ordered, adjudged, and decreed that said Henry P. Wakelee have and recover from said Erwin Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18th, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars;

That December 23rd, 1875, said Erwin Davis filed in said district court of the United States a petition for his discharge in said bankruptcy proceedings;

That thereupon, February 23rd, 1876, said Henry P. Wakelee filed in the same matter specifications of opposition to the discharge in bankruptcy of said Erwin Davis, alleging therein the following acts of Erwin Davis: Concealment of books relating to his estate or effects, being a merchant and trader and not keeping proper books of account, procuring assent of certain creditors to his discharge by pecuniary considerations, influencing action of such creditors as to discharge by such considerations, fraudulently absconding from and remaining ever since out of jurisdiction of the United
193 States of America during his examination in bankruptcy, so that he could not be fully examined after having been duly summoned to appear; and it further appearing that on March 18th, 1876, said Erwin Davis filed in the said matter a sworn petition and notice of motion to cancel said proofs of debt and dismiss and disregard said specifications of opposition, and this petition alleged the said proof of debt and leave of court to sue, and that said Henry P.

Wakelee commenced an action July 19th, 1873, against said Erwin Davis in said State court for the same cause of action on which he had proved up said debt as aforesaid, and that in due course of said action he obtained a judgment in his favor and against said Erwin Davis, which said judgment still stood of record in said fifteenth district court and was in full force; that said judgment set up in said petition was that given November 18th, 1873, as aforesaid;

That July 20th, 1876, said motion was heard by said district court of the United States upon said petition, notice of motion, and specifications of opposition, and was argued both by counsel for said Henry P. Wakelee and said Erwin Davis;

That said Erwin Davis filed in and submitted to said court on said motion a stipulation of facts, signed by the counsel for both said Wakelee and said Davis, which recited the filing of said petition September 11th, 1869; the said adjudication in bankruptcy; the said proof of debt; the said order granting leave to sue; the commencement of said action; the recovery of said judgment; the commencement of an action on said judgment in France, all prior to the filing of said petition for discharge; the removal of said action from France to England, where it was still pending; that said judgment was not cancelled, and recited the pending motion to expunge said proof of debt and dismiss the opposition;

That upon said motion it was maintained and submitted to the court for decision by the counsel for said Erwin Davis, the bankrupt, and it was thereupon and therefore decided by the said court that the debts or claims proved up as aforesaid by Henry P.
191 Wakelee in said bankruptcy proceedings against said Erwin Davis, the bankrupt, had become merged and extinguished in said judgment given by said district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, and were no longer in existence, but had become a new debt, created since the filing of the petition in bankruptcy by said Erwin Davis September 11th, 1869, and therefore was not such a debt as was provable in such bankruptcy proceeding, and could not be barred by any discharge of said Erwin Davis, the bankrupt, in said proceedings, and therefore said Wakelee had no standing in that court to oppose such discharge, and that said original proof of debt should be cancelled and the said specifications of opposition dismissed, set aside, and in all things disregarded;

That thereupon there was entered October 31st, 1876, in said bankruptcy proceedings by said district court of the United States a decree or order cancelling said proofs of debt and dismissing, setting aside, and forever disregarding said specifications of opposition; and it appearing further that no appeal from said order or decree of October 31st, 1876, was ever taken nor any further opposition to said discharge made by said Henry P. Wakelee or any person claiming under him;

That said Davis thereafter obtained his final discharge in bankruptcy in said proceedings;

That thereafter the complainant, Angelica Wakelee, became, and now is, the lawful owner of said judgment given or made Novem-

ber 18th, 1873, by and in said district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco;

That since October 31st, 1876, said Erwin Davis, the defendant, has frequently set up and claimed in sundry actions, suits, and proceedings in various jurisdictions instituted between himself and the then owner of said judgment and still claims and sets up that said judgment is void for lack of jurisdiction of the said district court of the fifteenth judicial district because said Erwin Davis was
195 not personally served with the summons and did not appear in said action;

That said Erwin Davis has frequently threatened and still threatens to defeat recovery upon said judgment in any action, suit, or proceeding that may be brought thereon by setting up that said judgment is void because of said lack of jurisdiction:

Now, therefore, it is ordered, adjudged, and decreed that defendant, Erwin Davis, his heirs, assigns, executors, and administrators, be, and they and each and every of them are, forever estopped from claiming, alleging, or setting up against the complainant, Angelica Wakelee, her heirs, executors, administrators, and assigns, or any or either of them, by answer, demurrer, plea, or other defense or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form, in any action at law or suit in equity or in any proceeding whatever in this or any other jurisdiction, and from in any manner whatsoever and wheresoever maintaining that said judgment was not duly made, given, or entered by a court having competent jurisdiction, is not valid, and does not still stand of record in said district court of said fifteenth judicial district, and is not in full force against the said defendant, Erwin Davis, his heirs, executors, administrators, and assigns, or any and every of them.

196 And it is further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against said Erwin Davis restraining him, his heirs, executors, administrators, assigns, attorneys, agents, and servants, and each and every of them, from claiming, alleging, or setting up, by answer, demurrer, plea, or other defense or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form, in any action at law or suit in equity or in any other proceeding whatever in this or any other jurisdiction, and from in any manner or form whatsoever and wheresoever maintaining against the complainant, Angelica Wakelee, her heirs, executors, administrators, and assigns, or any or either of them, that the judgment given, made, or entered by and in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco on the eighteenth day of November, 1873, in an action wherein Henry P. Wakelee was plaintiff and said Erwin Davis was defendant, in favor of said Henry P. Wakelee and against said Erwin Davis for the sum, in United States gold coin, of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon from said date till paid at the rate of seven per cent. per annum, together with said plaintiff's costs and disbursements incurred therein, amounting to the

sum of forty-nine dollars, was not duly given, made, or entered by a court having competent jurisdiction thereof, is not valid, or does not still stand of record in said district court and is not in full force against this said defendant, Erwin Davis, his heirs, executors, administrators, and assigns, or any and every of them, pursuant to the prayer of said bill of complaint.

And it is further ordered, adjudged, and decreed that the said defendant pay to said complainant her costs in this suit to be taxed, and that the said complainant have execution for such costs.

ALFRED C. COXE, *U. S. J.*

197 [Endorsed:] Circuit court of the United States for the southern district of New York. Angelica Wakelee *versus* Erwin Davis. In equity. No. 4111. Copy. Final decree. Anson Maltby, solicitor for compl't, 48 Wall street, New York. U. S. circuit court. Filed Mar. 9, 1891. John A. Shields, clerk.

SIR: Please take notice that the within proposed decree will be presented for settlement to the Hon. Alfred C. Coxe, at his chambers at Utica, New York, on Thursday, 5th day of March, 1891, at 11 o'clock a. m.

New York, 28th February, 1891.

ANSON MALTBY,
Sol. for Pl'ff, 48 Wall St., N. Y. City.

To Henry A. Root, Esq., sol. for def't.

Service of within proposed decree and notice of settlement admitted.

HENRY A. ROOT,
28 Febr'y, 1891. *Sol. for Def't.*

198 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE, Complainant,
vs.
ERWIN DAVIS, Defendant.
} Bond for Damages & Costs.

Know all men by these presents that we, Erwin Davis, of 121 Madison avenue, New York city, and Eugene R. Leland, of 80 Broadway, N. Y. city, are held and firmly bound unto the above-named Angelica Wakelee in the sum of five hundred ($ 00.00) dollars, to be paid to the said Angelica Wakelee, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the fifteenth day of April, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Erwin Davis has prosecuted an appeal to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Erwin Davis shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make his
199 said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ERWIN DAVIS. [SEAL.]
EUGENE R. LELAND. [SEAL.]

Sealed and delivered and taken and acknowledged this 13th day of April, 1891, before me, as to Erwin Davis.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Sealed and delivered and taken and acknowledged this 15th day of April, 1891, before me, as to Eugene R. Leland.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Eugene R. Leland, being duly sworn, deposes and says that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

E. R. LELAND.

Sworn to this fifteenth day of April, A. D. 1891, before me—

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

200 [Endorsed:] U. S. circuit court southern district of New York. Angelica Wakelee, complainant, *vs.* Erwin Davis, defendant. Bond for damages and costs on appeal to the U. S. Supreme Court. Approved as to form and sufficiency of sureties. Apr. 16th, 1891. Alfred C. Coxe, U. S. J. U. S. circuit court. Filed Apr. 16, 1891. John A. Shields, clerk.

201 Circuit Court of the United States, Southern District of New York, Second Circuit.

ANGELICA WAKELEE, Complainant, } In Equity.
against
ERWIN DAVIS, Defendant. }

To the honorable the Supreme Court of the United States:

The appeal of Erwin Davis, defendant and appellant above named, on information and belief showeth:

That upon the 13th day of April, 1888, the above-named complainant filed her bill of complaint in the circuit court of the United States for the southern district of New York, in the second circuit, against the above-named defendant-appellant in a suit in equity;

That said bill, among other things, prayed that a writ of *subpœna ad respondendum* be issued, directed to the defendant.

This defendant appellant further shows that, pursuant to said prayer, a writ of *subpœna ad respondendum* was issued out of and under the seal of said circuit court and was duly served on said defendant appellant, and that said defendant appellant appeared and thereafter and on June 4, 1888, filed a demurrer to said bill of complaint; that thereafter and on June 27, 1888,
202 pursuant to an order of said circuit court, the complainant filed amendments to said bill; that thereafter and on August 6, 1888, the defendant appellant filed a demurrer to said bill as so amended; that thereafter said demurrer to said bill of complaint as amended having come on to be heard, an order of said circuit court was made and entered on January 29, 1889, allowing said demurrer, but permitting complainant to amend her bill, if so advised, within twenty days after the entry of said order and the service of a copy thereof upon the solicitor for the complainant.

That thereafter and on February 4, 1889, the complainant, pursuant to said order of January 29, 1889, filed her amended bill of complaint in said circuit court, alleging, among other things, as follows:

That the complainant is a citizen of California and the defendant of New York; that between August 26 and September 8, 1869, both days inclusive, Davis made his five promissory notes to the order of one H. P. Wakelee (which notes are set forth in full in the bill) and delivered the same for value to said Wakelee, who thereby became the owner and holder thereof; that thereafter and before this suit said notes were assigned to complainant; that said notes and the interest thereon have never been paid; that on September 11, 1869, Davis filed his petition in the United States district court for the district of California to be adjudged a voluntary bank-
203 rupt and on September 30, 1869, was so adjudged; that H. P. Wakelee thereon proved the debt evidenced by said promissory notes against the estate of said Davis in said bankruptcy proceedings; that Davis neglected to file his petition for a discharge till December 23, 1875.

That meantime said H. P. Wakelee obtained leave in said bankruptcy proceedings to sue Davis and did sue him, and on November 18, 1875, obtained in the district court for the fifteenth judicial district of the State of California in and for the county of San Francisco a judgment against Davis on said promissory notes for twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars ($22,809.26); that said judgment was obtained without personal service of summons upon Davis and without appearance in said action of said Davis by attorney or in person and without his answering or demurring to the complaint therein and without any proceedings by attachment or *in rem* therein.

That thereafter and on December 23, 1875, Davis filed his petition for discharge in bankruptcy, that on February 23, 1876, said H. P. Wakelee filed specifications of opposition to such discharge; that on March 18, 1876, Davis filed his petition and notice of motion

in said bankruptcy proceedings to cancel said Wakelee's proof of debt and to dismiss his specifications on the grounds that H. P. Wakelee, after proving his debt in bankruptcy, obtained leave to sue Davis and did sue for the same cause of action on which he had proved up his debt and obtained judgment, and that said judgment still stood of record and was in full force; that said motion
204 was argued July 20, 1876, by counsel for Wakelee and Davis on said petition, notice of motion, and said specifications of opposition; that it was claimed, declared, and admitted and assurance was made by counsel for Davis that, by reason of the facts alleged in said petition and notice of motion filed March 18, 1876, the original debts of Davis had merged in said judgment of November 18, 1873, and thereby become a new debt since the adjudication of Davis as a bankrupt; that said judgment was subsisting, valid, and enforceable and would not be barred or discharged or in anywise affected by the discharge of Davis, but would remain standing of record and valid, and, further, that said H. P. Wakelee had by reason of such facts no standing and was not interested in such bankruptcy proceedings and was not, therefore, a party competent to oppose the discharge of said Davis.

That on October 31st, 1876, an order was made by the United States district court canceling all proofs of debt against the estate of Davis filed by said H. P. Wakelee and dismissing and setting aside his specifications of opposition to Davis's discharge; that said order of October 31, 1876, was based upon and made by reason of the allegations contained in said specifications of opposition and said petition and notice of motion filed March 18, 1876, and the declarations and admissions, assurances and representations of counsel for Davis made in open court.

That said Wakelee relied upon, believed, and accepted as
205 true and binding said claims and admissions and declarations, assurances, representations, and allegations of Davis and his counsel that said judgment was valid and binding upon Davis, and that the same would not be barred or affected by any discharge of said Davis and said Wakelee was thereby induced to believe and accept and did believe and accept as binding and correct in law the said order of October 31, 1876, and by reasons of said admissions, declarations, assurances, allegations, and representations was induced to accept and did accept said order and did not appeal therefrom.

That said order was accepted by Davis, and he thereafter obtained his final discharge in bankruptcy; that said H. P. Wakelee was, on October 31, 1876, the owner of said promissory notes and of said judgment of November 18, 1873; that neither said H. P. Wakelee or any subsequent owner or assignee of said notes ever after October 31, 1876, made any opposition to Davis's discharge in bankruptcy.

That thereafter and before this suit said judgment of November 18, 1873, was assigned to this complainant; that said judgment is still standing of record and is in equity of full and binding force and validity by reason of the facts herein alleged; that said judgment of November 18, 1873, is still wholly unpaid.

That complainant insists that by reason of all the facts, proceedings, and of the claims, declarations and admissions, assurances, representations, and allegations of said Davis and his counsel and the various orders and judgments hereinbefore set forth and

206 upon all the premises Davis is forever estopped from setting up against complainant, by answer, demurrer, bill of complaint, or otherwise, in any future action at law or suit in equity or in any proceeding whatever upon or concerning said judgment of November 18, 1873, that the debts proved up in bankruptcy by said H. P. Wakelee were not merged in the said judgment of November 18, 1873; that said judgment is not valid and does not still stand of record in said district court for the fifteenth judicial district of the State of California in and for the city and county of San Francisco, and is not in full force; that said judgment does not constitute a new debt which is unaffected by said Davis's discharge, and that such discharge is a bar to any such suit, action, or proceeding upon said judgment.

That heretofore Davis has claimed that said judgment of November 18, 1873, is void because of lack of jurisdiction of the court wherein it was entered, for the reason that Davis was not personally served with process, did not appear in said action, and, further, that he has obtained a discharge which forever bars all recovery upon said judgment; that Davis has frequently threatened and still threatens to defeat recovery upon said judgment by setting up that said judgment is void because of said lack of jurisdiction, and that said discharge forever bars all suits upon said judgment.

That the complainant is about to begin an action at law upon said judgment in the State of New York, which is the State wherein said Davis resides.

207 That under the laws of the State of New York the facts set forth constituting the estoppels as herein claimed cannot be pleaded in plaintiff's complaint as or in aid of a cause of action, but the said action must be brought upon such judgment alone, and in such an action it is necessary to allege in the complaint either the facts showing the jurisdiction of the court in which the judgment was entered or that the judgment was duly entered, and that unless this be done the complaint would be dismissed on demurrer; that complainant is unable truthfully to allege in such complaint such jurisdictional facts or that such judgment was duly entered, and that complainant is remediless in an action at law to maintain her rights under said judgment and under the facts hereinbefore set forth.

That said amended bill prayed that Davis be adjudged to be forever estopped from claiming, alleging, or setting up against complainant, by answer, demurrer, bill of complaint, or otherwise, in any action at law or suit in equity or in any proceeding whatever upon or concerning said judgment of November 18, 1873, that the debts proved up in bankruptcy as aforesaid by the said H. P. Wakelee were not merged in the said judgment entered in his favor against Davis as aforesaid November 18, 1873; that said judgment is not valid and does not still stand of record in said district court for the

fifteenth judicial district of the State of California in and for the city and county of San Francisco, and is not in full force;
208 that said judgment does not constitute a new debt which is unaffected by said Davis's said final discharge in bankruptcy, and that such discharge is a bar to any suit, action, or proceeding upon said judgment.

That said amended bill further prayed that a writ of injunction issue out of and under the seal of said United States circuit court perpetually enjoining and restraining the defendants from asserting, claiming, or alleging against complainant, by answer, demurrer, or otherwise, in any action, suit, or other proceeding whatever upon or concerning said judgment of November 18, 1873, that the debts proved up in bankruptcy as aforesaid by said H. P. Wakelee were not merged in the said judgment of November 18, 1873; that said judgment is not valid and does not still stand of record in said court; that said judgment does not constitute a new debt which is unaffected by said Davis's said final discharge in bankruptcy, and that such discharge is a bar to any suit, action, or proceeding upon said judgment, and in particular enjoining and restraining said defendant from using in support of his claim and defense in any such action, suit, or proceeding his said discharge in bankruptcy.

That said amended bill further prayed that a writ of provisional injunction also issue enjoining the defendant to the same purport and tenor as prayed for in regard to said perpetual injunction.

This defendant, appellant, further shows that thereafter and
209 on the 11th day of February, 1889, this defendant filed a demurrer to said bill of complaint, and thereafter, said demurrer to said amended bill of complaint having come on to be heard before said circuit court, an order was filed herein on the 29th day of June, 1889, disallowing the said demurrer to said amended bill, but also further ordering that this defendant, if so advised, might withdraw his said demurrer and file his answer to said amended bill of complaint within twenty days after the entry of said order and the service of a copy of the same upon the solicitor for this defendant.

That thereafter and pursuant to the leave granted by said order of June 29, 1889, this defendant, appellant, filed his answer to said amended bill of complaint, and therein denied certain allegations in said amended bill.

That thereafter a general replication to said answer was filed by the complainant, and, issue being thus joined, testimony was thereupon taken in behalf of the complainant and defendant respectively.

That thereafter, this case coming on to be heard before the said circuit court, a final decree was entered herein adjudging in substance that the defendant, Erwin Davis, his heirs, assigns, executors, and administrators, be, and they and each and every of them are forever, estopped from claiming, alleging, or setting up against the complainant, Angelica Wakelee, her heirs, executors, administrators, and assigns, or any or either of them, by answer, demurrer, plea, or other defense or declaration, complaint, bill of complaint, reply,

replication, or in any other manner or form, in any action at
210 law or suit in equity or in any proceeding whatever, in this or any other jurisdiction, and from in any manner whatsoever and wheresoever maintaining that said judgment of November 18, 1873, was not duly made, given, or entered by a court having competent jurisdiction, is not valid, and does not still stand of record in said district court for said fifteenth judicial district and is not in full force against the said defendant, Erwin Davis, his heirs, executors, administrators, and assigns, or any and every of them, and also further adjudging that a perpetual injunction be issued in this suit against said Erwin Davis, restraining him, his heirs, executors, administrators, assigns, attorneys, agents, and servants, and each and every of them, from claiming, alleging, or setting up, by answer, demurrer, plea, or other defense or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form, in any action at law or suit in equity or in any other proceeding whatever, in this or any other jurisdiction, and from in any manner or form whatsoever and wheresoever maintaining against the complainant, Angelica Wakelee, her heirs, executors, administrators, and assigns, or any or either of them, that the judgment given, made, or entered by and in the district court for the fifteenth judicial district of the State of California in and for the city and county of San Francisco on the 18th day of November, 1873, in an action wherein Henry P. Wakelee was plaintiff and said Erwin Davis was defendant, in favor of
said Henry P. Wakelee and against said Erwin Davis, for the
211 sum, in United States gold coin, of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars ($22,760.26), with interest thereon from said date till paid at the rate of seven per cent. per annum, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars ($49), was not duly given, made, or entered by a court having competent jurisdiction thereof, is not valid, or does not still stand of record in said district court and is not in full force against this said defendant, Erwin Davis, his heirs, executors, administrators, and assigns, or any and every of them, pursuant to the prayer of said bill of complaint, and further adjudging that the said defendant pay to said complainant her costs in this suit, to be taxed, and that the said complainant have execution for such costs.

That the said decree is, as this defendant is advised, erroneous and ought to be reversed.

Wherefore this defendant, appellant, appeals from the said decree of the said circuit court of the United States to the Supreme Court of the United States, and respectfully prays that the decree of the said circuit court, together with the bill of complaint, answer, replication, pleadings, depositions, exhibits, and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court may
be reversed and a decree made dismissing said bill of com-
212 plaint with costs or such other decreee as to the said Supreme Court shall seem just.

Dated New York, April 13th, 1891. ERWIN DAVIS.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Erwin Davis, being duly sworn, says that he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ERWIN DAVIS.

Subscribed and sworn to before me this 13th day of April, 1891.
JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Allowed Apr. 16th, 1891.

ALFRED C. COXE, *U. S. J.*

213 Due and timely service of a copy of the within petition for appeal is hereby admitted.
Dated N. Y., April 17, 1891.

ANSON MALTBY,
Sol'r Compl't.

Endorsed: Circuit court of the United States, southern district of New York, second circuit. Angelica Wakelee, complainant, against Erwin Davis, defendant. Petition for appeal. Henry A. Root, solicitor for defendant, appellant. Office & post-office address, 10 Wall street, New York city. U. S. circuit court. Filed Apr. 17, 1891. John A. Shields, clerk.

214 UNITED STATES OF AMERICA, ss:

To Angelica Wakelee, Greeting:

Whereas Erwin Davis has appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, Angelica Wakelee:

Therefore you are hereby cited and admonished to appear before the said Supreme Court, at a term thereof to be holden at Washington on the fifteenth day of May, 1891, to do and receive what may appertain to justice in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, on the 16th day of April, 1891.

ALFRED C. COXE, *U. S. J.*

Endorsed: Due and timely service of a copy of the within citation is hereby admitted. Dated N. Y., April 17, 1891. Anson Maltby, sol'r for compl't. U. S. circuit court. Filed Apr. 17, 1891. John A. Shields, clerk.

215 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANGELICA WAKELEE, Complainant,
against
ERWIN DAVIS, Defendant. } In Equity.

It is hereby stipulated that the foregoing shall constitute the record on appeal to the United States Supreme Court in this case; and it is further stipulated that all documents introduced in evidence were duly exemplified or certified.

Dated New York May, 19, 1891.

ANSON MALTBY,
Solicitor for Complainant.
HENRY A. ROOT,
Solicitor for Defendant.

Endorsed: Circuit court of the United States, southern district of New York. Angelica Wakelee *vs.* Erwin Davis. Stipulation as to record on appeal to Supreme Court. U. S. circuit court. Filed May 21, 1891. John A. Shields, clerk.

216 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 215, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Angelica Wakelee, complainant, appellee, against Erwin Davis, defendant, appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 21st day of May, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 1185. Erwin Davis, appellant, *vs.* Angelica Wakelee. Filed May 22, 1891.

Supreme Court of the United States.

No. 1185.

EDWIN DAVIS,
Appellant,

vs.

ANGELICA WAKELEE,
Appellee.

MOTION TO ADVANCE CASE ON DOCKET.

HENRY A. ROOT,
Solicitor for Appellant,
10 Wall Street, New York.

JOSEPH H. CHOATE,
THADDEUS D. KENNESON,
Counsel.

Evening Post Job Printing House, N. Y.

Supreme Court of the United States.

ERWIN DAVIS,
Appellant,

AGAINST

ANGELICA WAKELEE,
Appellee.

No. 1185.

Brief Statement of Facts and Objects of Motion.

This is a motion by the appellant to take this case out of its regular order on the docket, and to set the same down for argument on a day certain to be fixed by this Court.

This action was brought by Wakelee against Davis in aid of a contemplated action at law. One Henry P. Wakelee obtained in 1872 a void judgment against Davis in a State Court of California, which judgment has been assigned to the appellee. The contemplated action at law was an action upon this void judgment. The bill of complaint alleged that Davis had two defenses to the contemplated action at law: (1) that said judgment was invalid because of want of jurisdiction in the California Court to grant it; (2) a discharge in bankruptcy obtained subsequent to said California judgment. The bill alleged facts which Wakelee claimed estop-

ped Davis from claiming the invalidity of the California judgment, or from setting up his discharge as a defense thereto. The reason for coming into equity was the alleged want of adequate remedy in the action at law to use the said estoppels. The relief asked was an injunction restraining Davis from claiming the invalidity of the California judgment and from setting up as a defense thereto the discharge in bankruptcy. The complainant obtained a final decree awarding her an injunction restraining Davis from claiming the invalidity of the judgment; but the Court denied her an injunction restraining Davis from setting up in the contemplated action at law his defense of a discharge in bankruptcy. Since the decree in this action from which the appeal to this Court is pending, Wakelee has sued Davis in the United States Circuit Court for the Southern District of New York upon said California judgment. The appeal herein does not suspend the operation of the injunction granted herein by the final decree; and pending the determination of this appeal Davis is unable to avail himself in the action at law of the defense of the invalidity of the California judgment sued upon in that action. If Davis is obliged to defend the law action upon the defense which he is entitled to avail himself of, a judgment in that action will certainly be reached and any appeal therein determined long before this case can be reached in its regular order on the docket of this Court. If the judgment in the law action is adverse to Davis, he may, therefore, be compelled to pay a heavy judgment and have no redress in case this Court ultimately determines this appeal in his favor and decides that he had a right to insist in the law action upon the invalidity of the California judgment. Such a defense would, of course, terminate the litigation in Davis' favor; and it is certainly unjust to force him to an adverse judgment and to the pay-

ment of a large sum of money, when this Court 7
may ultimately decide that he has a perfect defense to the action, and ought never to have been forced to meet an adverse judgment or to pay the same.

The appellee has made a motion to dismiss the appeal to this Court and to affirm the judgment below, and this Court, upon said motion, will be called to enter into the case at large.

By reason of these facts Davis asks that this case be taken out of its regular order and advanced for argument.

Dated New York, September 28, 1891.

HENRY A. ROOT,
Solicitor for Appellant, 8
10 Wall Street,
New York.

JOSEPH H. CHOATE,
THADDEUS D. KENNESON,
Counsel.

SUPREME COURT OF THE UNITED STATES.

ERWIN DAVIS,
Defendant-Appellant, 9

vs.

ANGELICA WAKELEE,
Complainant-Appellee.

Please take notice that upon the annexed affidavit of Thaddeus D. Kenneson, verified the 28th day of September, 1891, and upon the annexed statement of motion, and upon the transcript of the record

10 filed herein in the office of the Clerk of this Court, May 22, 1891, before the Supreme Court of the United States, at a Term to be holden at Washington, on the ~~second~~ third Monday of October, 1891, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, a motion will be made on the part of the appellant above-named to take this case up out of its order on the regular docket, and put the same down for argument for a particular day to be named by said Court, and for such other and further relief as to the Court may seem just.

New York, September 28, 1891.

11 HENRY A. ROOT,
Solicitor for Appellant,
10 Wall St.,
N. Y. City.

JOSEPH H. CHOATE,
THADDEUS D. KENNESON,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

12 ERWIN DAVIS,
Defendant-Appellant,

vs.

ANGELICA WAKELEE,
Complainant-Appellee.

STATE OF NEW YORK,
Southern District of New York, } ss.:

THADDEUS D. KENNESON, being duly sworn, says: That he is an attorney and counsellor at law; that he

has been of counsel for Erwin Davis, the appellant herein, since the beginning of this action, and personally acquainted with every step thus for taken herein. On April 13, 1888, the complainant, Angelica Wakelee, filed her bill of complaint in the United States Circuit Court for the Southern District of New York, in the Second Circuit (Record, fols. 1–29). The defendant, June 4, 1888, filed a demurrer. June 27, 1888, complainant filed amendments to said bill (Record, fols. 30–32). August 6, 1888, defendant filed a demurrer to said bill as so amended (Record, fols. 33–34)). Thi s demurrer was sustained by an order of said Circuit Court entered January 29, 1889 (Record, fols. 40–41). This order permitted complainant to amend her bill, which she did, and the amended bill was filed January 4, 1889 (Record, fols. 42–71). 13 14

This bill attempted to set forth a cause of action in aid of a contemplated action at law.

In substance, the bill alleged that on November 18, 1873, one H. P. Wakelee, (through whom the complainant got title by mesne assignments), obtained against Davis a judgment for $22,809.26, in the District Court for the Fifteenth Judicial District of the State of California in and for the County of San Francisco; that said judgment was obtained without personal service of summons upon Davis, and without appearance in said action of said Davis by attorney or in person, and without his answering or demurring to the complaint and without any proceedings by attachment or *in rem*. 15

That the complainant was about to begin an action at law upon said judgment in the State of New York wherein Davis resides.

That defendant had two defenses to such contemplated action: (1) that the judgment sued upon was obtained without jurisdiction of the person of Davis,

16 and was, therefore, void; (2) that the judgment was released by a discharge in bankruptcy obtained by Davis subsequent to said judgment.

The bill set forth facts which the complainant claimed should estop the defendant Davis either from claiming said judgment was void, or from setting up as a defense thereto the discharge in bankruptcy.

The reason alleged for coming into a court of equity was want of inadequacy of remedy at law.

The bill prayed an injunction restraining Davis from asserting, claiming or alleging against complainant by answer, demurer or otherwise, in any
17 action, suit or other proceeding upon said judgment of November 18, 1873, that said judgment is not valid, and in particular enjoining and restraining Davis from using in support of his claim and defense his said discharge in bankruptcy.

The defendant filed a demurrer to said amended bill February 11, 1889 (Record, fols. 76 77). This demurrer was overruled by an order of said Circuit Court entered June 29, 1889 (Record, fols. 90-92). The defendant thereafter filed an answer to said amended bill (Record, fols. 93-98) to which a replication was filed by complainant (Record, fol. 99), and thereafter the case having been heard upon the pleadings and proofs, a final decree was
18 entered March 9, 1891, adjudging that a perpetual injunction be issued against Davis restraining him, his heirs, executors, administrators, assigns, attorneys, agents, and servants, and each and every of them, from claiming, alleging or setting up, by answer, demurrer, plea, or other defense or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form, in any action at law or suit in equity, or in any other proceeding whatever in this or any other jurisdiction, and from in any manner or form whatsoever and wheresover maintaining

against the complainant Angelica Wakelee, her 19
heirs, executors, administrators and assigns, or any or either of them, that the judgment given, made or entered by and in the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco, on the eighteenth day of November, 1873, in an action wherein Henry P. Wakelee was plaintiff, and said Erwin Davis was defendant, for the sum in United States gold coin, of $22,760.26, with interest thereon from said date till paid, at the rate of 7 per cent. per annum. * * * was not duly given, made, or entered by a court having competent jurisdiction thereof, is not valid, or does not still stand of record 20
in said District Court, and is not in full force against this said defendant, Erwin Davis, his heirs, executors, administrators and assigns, or any or every of them, pursuant to the prayer of said bill."

It is to be observed that this decree does not enjoin the defendant Davis from pleading his discharge in bankruptcy as a defense to an action to be brought upon the California judgment. The reason for granting the injunction against Davis claiming the invalidity of the California judgment and denying an injunction against setting up the defense of a discharge, is to be found in the opinion of Judge Shipman (Record, fols. 84–89). He thought complainant could avail herself in the law action of all thet facs 21
which she claimed estopped Davis from relying upon his discharge as a defense (Record, fol. 89). He thought she could not adequately avail hersef in such an action of the facts estopping Davis from insisting upon the invalidity of the California judgment (Record, fol. 87).

Thereafter and on April 16, 1891, the defendant presented his petition (Record, fols. 201–212), praying for an appeal from said decree of said Circuit Court to this Court to Hon. Alfred C. Coxe, and said appeal was duly granted and a bond duly approved

22 (Record, fols. 198–199), and a citation duly issued to the complainant. Thereafter said petition and citation were duly served and the record on appeal duly filed in this Court May 22, 1891, and the appearance of counsel entered herein on said day (Record, fol. 196).

Thereafter and on March , 1891, a perpetual injunction in the terms of said decree issued and is now in force.

Subsequent to the entry of said final decree and the issuance of said injunction the complainant in this action brought an action at law against Erwin
23 Davis in the United States Circuit for the Southern District of New York, Second Circuit, upon said judgment of November 18, 1873. Deponents' firm, Kenneson, Crain & Alling, filed an appearance in said action for the defendant Erwin Davis on the day , 1891. Thereafter and on the 22d day of June, 1891, the complaint in said action was served and an exact copy of the same is hereto annexed marked Exhibit "A," and made a part of this affidavit. The defendant has not yet answered in said law action, but his time has been extended as will more fully appear hereafter.

24 Thereafter the complaint in said action at law having been served, Davis found himself confronted with a very puzzling problem. He had appealed to this Court from the final decree of the Circuit Court, and given a supersedeas bond; but said bond did not have the effect to suspend the operation of the final injunction granted by said decree pending the determination of the appeal to this Court. Accordingly, when the complainant sued at law upon the California judgment, Davis found it impossible in said law action to plead the invalidity of the judgment sued upon or in any way to avail himself of the in-

validity thereof without placing himself in contempt 25
of Court.

The only defense left to him was that of his discharge in bankruptcy.

The number of this appeal upon the calendar of this Court is 1185, and it cannot, we suppose, be reached in its regular order for three or four years.

If meanwhile Davis must go on and answer and set up his discharge in bankruptcy in the law action, a judgment may be obtained against him for a large amount in a few months and long before this appeal can be determined in its regular order. Nay, more, if Davis should appeal from said judgment such ap- 26
peal would have to be taken to the new Circuit Court of Appeals, as the jurisdiction depends solely upon the citizenship of the parties, and said appeal would be disposed of long before this appeal in its regular order can be reached. And said appeal to said Circuit Court of Appeals is final. The result, therefore, may be that long before this appeal in this Court in its regular order can be reached, every effort of Davis to protect himself in the law action may be exhausted and he be obliged to pay a large judgment against him.

And if in the end this Court reverses the decree below and holds that Davis has a right to insist in 27
the action upon the California judgment upon the want of jurisdiction of the California Court to grant the same, it would be but slight solace to Davis that he will ultimately be entitled to restitution when it is conceded, as it is in this case, that the complainant is impecunious.

The appellee in this appeal has noticed a motion for the second Monday of October, 1891, before this Court, to dismiss the appeal herein to this Court, and

also to affirm the decree appealed from upon the ground that the appeal was taken "for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument."

Upon the argument of said motion this Court will, of course, have to examine the record with almost the same care and attention as upon a regular argument of the appeal in its turn, and in view of the peculiarly difficult position in which the appellant finds himself placed, he asks this Court to take this case out of its regular order upon the docket of this Court, and set it down for some day convenient for this Court to hear argument of the same.

Davis in the law action in the Unites States Circuit Court, sometime since, represented to said Court that the appellee had made a motion in this Court to dismiss the appeal and to affirm the decree, and also stated to said Court that he himself intended to make a motion in this Court to advance the argument of this appeal, and said Court accordingly has extended his time in said action to answer until ten days after the determination by this Court of said motion by the appellee to dismiss or affirm, or until ten days after this Court shall have decided the appeal herein, in case a motion to that effect shall be granted.

If this Court shall grant this motion and decide to hear the appeal upon its merits at some near date, the parties will know what course they must take in the law action below. If this Court reverse the decree and holds Davis not entitled to depend upon the ground of want of jurisdiction of the California Court to avoid the judgment, then the litigation will be at an end. If this Court affirm

the decree below, then Davis must thereafter abandon the defense of the invalidity of the California judgment and pursue his defense of a discharge for what it is worth. But in either event when the law action is finally decided the litigation will be at an end. Davis will have been permitted to use all his defenses and there will not be the spectacle of an unjust judgment unjustly wrung from Davis, when finally this Court may decide that he was entitled to a defense, which should forever have prevented any such judgment. 31

THADDEUS D. KENNESON.

Sworn to before me this 28th day of September, 1891. } Thaddeus D Kenneson 32

CHARLES ESSELSTYN,
[L. S.] Ellis J Brannan
Notary Public,
N. Y. Co.

33

34

Exhibit A.

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE,
Plaintiff,

VERSUS

ERWIN DAVIS,
Defendant.

35

The plaintiff complaining of the defendant, alleges upon information and belief:

I.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

II.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

III.—That on the eighteenth day of November,
36 1873, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State.

IV.—That on the eighteenth day of November, 1873, at said City of San Francisco, one Henry P. Wakelee recovered a judgment which was duly given by said court against the defendant, by the terms of which judgment it was ordered, adjudged and decreed, that said Henry P. Wakelee "have and

recover from said defendant Erwin Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{28}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum, from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{28}{100}$ dollars, in an action wherein said Henry P. Wakelee was plaintiff and the defendant herein was defendant. 37

V.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw for value, and on November 9, 1886, Charles E. Laidlaw for value sold and assigned the said judgment to this plaintiff who is still the owner thereof. 38

VI.—That no part thereof has been paid, and the whole amount still remains due owing, and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

Wherefore, the plaintiff demands judgment against the defendant Erwin Davis in the sum in United States gold coin of ($22,809.26) twenty-two thousand eight hundred and nine $\frac{28}{100}$ dollars, with interest at the rate of seven per cent. per annum from November 18, 1873, besides the costs of this action. 39

ANSON MALTBY,
Attorney for the Plaintiff.

Southern District of New York, ss.:

ANSON MALTBY, being duly sworn, says: He is the attorney for the plaintiff herein, and resides at New Rochelle, in the County of Westchester. That the foregoing complaint is true to the knowlege of the

deponent, except as to those matters therein stated to be alleged on information and belief, and to those he believes it be true.

Deponent further says that the grounds of his belief as to all matters therein not stated upon his knowledge are as follows: The possession and inspection of exemplied copies of the judgment roll entered in the action alleged in the foregoing complaint, and of records docketed in the matter of Erwin Davis, a bankrupt, in the United States District Court for the District of California, and the inspection of the documents forming the judgment roll filed in a suit in equity in the United States Circuit Court for the Southern District of New York, March, 1891, wherein this plaintiff was complainant and this defendant was defendant.

Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not within the said County of Westchester, nor within the State of New York.

ANSON MALTBY.

Sworn to before me this
22d day of June, 1891.

FIELDING L. MARSHALL,
Notary Public,
N. Y. Co.

Office Supreme Court U. S.
FILED.
OCT 17 1891
JAMES H. MCKENNEY,

Supreme Court of the United States.

No. 1185.

ERWIN DAVIS,
Appellant,

vs.

ANGELICA WAKELEE,
Appellee.

Appellee's Statement on Motion to Advance Case on Docket.

To this motion to advance this appeal for argument the appellee has no objection, but, on the contrary, would be glad to have it granted.

At the same time, appellee cannot give formal assent, because such assent might be construed, in case this motion is denied, as a waiver of rights set up in pending motions made by appellee to dismiss appeal and affirm decree.

ANSON MALTBY,
Counsel for Appellee.

Office Supreme Court U. S.
FILED
OCT 17 1891
JAMES H. McKENNEY

Supreme Court of the United States.

No. 1186.

ERWIN DAVIS,
Appellant,

vs.

PIERRE B. CORNWALL,
Appellee.

Appellee's Statement on Motion to Advance Case on Docket.

To this motion to advance this appeal for argument the appellee has no objection, but, on the contrary, would be glad to have it granted.

At the same time, appellee cannot give formal assent, because such assent might be construed, in case this motion is denied, as a waiver of rights set up in pending motions made by appellee to dismiss appeal and affirm decree.

ANSON MALTBY,
Counsel for Appellee.

Office Supreme Court U. S.
FILED.
SEP 23 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 1185.

ERWIN DAVIS,

Appellant,

versus

ANGELICA WAKELEE

Appellee.

MOTIONS TO DISMISS APPEAL AND AFFIRM DECREE.
AFFIDAVITS AND NOTICE OF MOTION.

ANSON MALTBY,
Counsel for Appellee,
48 Wall Street,
New York.

Supreme Court of the United States. 1

ERWIN DAVIS,
Appellant,

VERSUS

ANGELICA WAKELEE,
Appellee.

No. 1185.

2

Now comes the appellee by counsel and moves to dismiss the appeal herein for the following reasons, to wit :

That the use of the name of Henry A. Root, Esq., as counsel for the appellant in the appearance entered May 22, 1891, herein in the office of the Clerk of this Court, was unauthorized by said Root and without warrant from him; that said appearance as counsel purporting to be signed by said Root was fictitious and was not signed by him. That the entry of appearance purporting to be that of said Root was unauthorized by and made without the knowledge 3 of said Root; and that no appearance as counsel for the appellant, who was the party who docketed this case, was entered in this Court at the time said case was docketed as required by paragraph 3 of Rule 9 of this Court nor up to this day.

And the appellee further moves to dismiss the appeal herein for the following reasons, to wit:

On the ground that the appeal bond approved and filed herein April 16, 1891, is defective in that it omits to state the term at which the decree was rendered, and thus does not describe with sufficient certainty the decree brought under review.

And the appellee further moves (in connection with the foregoing motions to dismiss) to affirm the decree herein on the ground that although the record may show that said Supreme Court has jurisdiction, it is manifest the appeal was taken for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument, and said questions have been frequently decided by this Court adversely to the position assumed by the appellant, and for such other and further relief as to the Court may seem proper.

Dated New York, September 5, 1891.

ANSON MALTBY,
Counsel for Appellee,
48 Wall Street,
New York.

SUPREME COURT OF THE UNITED STATES. 7

ERWIN DAVIS,
Appellant,

VERSUS

ANGELICA WAKELEE,
Appellee.

Please take notice that upon the annexed affidavits 8
of Anson Maltby, verified the 11th day of July, 1891, and the 5th day of September, 1891, and upon the annexed statement of motion, and upon the transcript of the record filed herein in the office of the Clerk of this Court, May 22, 1891, before the Supreme Court of the United States, at a term to be holden at Washington on the second Monday of October, 1891, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, a motion will be made on the part of the appellee above named to dismiss the appeal herein on the ground that no appearance of counsel for appellant has been entered in this Court, and a motion will also be made at the same 9
time on the part of the appellee to dismiss the appeal on the ground that the appeal bond approved and filed herein in the Circuit Court of the United States for the Southern District of New York, April 16, 1891, is defective in that it does not state at what term the decree was rendered, and thus does not describe with sufficient certainty the decree brought under review, and united therewith a motion will be made at the same time to affirm the judgment or decree herein on the ground that although the record may show that said Supreme

10 Court has jurisdiction, it is manifest the appeal was taken for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument, and said questions have been frequently decided by this Court adversely to the position assumed by the appellant, and for such other and further relief as to the Court may seem proper.

New York, September 5, 1891.

ANSON MALTBY,
Counsel for Appellee,
48 Wall Street,
New York.

11 To ERWIN DAVIS, Appellant.

SUPREME COURT OF THE UNITED STATES.

ERWIN DAVIS,
Defendant-Appellant,

AGAINST

12 ANGELICA WAKELEE,
Complainant-Appellee.

Southern District of New York, ss. :

ANSON MALTBY, being duly sworn, says: That he is counsel for the appellee herein, and that his appearance as such was duly entered in the office of the Clerk of this Court, May 22, 1891.

That deponent is informed by the Clerk of this Court, and verily believes, that a notice of the ap-

pearance of Henry A. Root, Esq., as counsel for the 13
appellant was entered herein May 22, 1891.

That deponent is informed by said Henry A. Root that he has had no connection with the appeal in this case, although he was solicitor for the defendant (appellant) in the Court below. That his connection with the case terminated before the appeal was taken, and that he did not authorize or know of the use of his name or the entry of his appearance as counsel for the appellant above named in any appeal taken in his name from the decree or judgment entered March 9, 1891, in the United States Circuit Court for the Southern District of New York.

Deponent further says that the appellee is a 14
widow of small means and needs the money involved in this litigation, and that this appeal is of very serious annoyance to her, and was taken, as deponent believes, for purposes of vexation and delay.

That about the time the appeal was to be taken deponent was asked by Thaddeus D. Kenneson, Esq., a lawyer who had been counsel in the Court below, to consent to a certain surety on the appeal bond and deponent suggested that the defendant appeal to the new Circuit Court of Appeals, as that would shorten the time of suspense, but the suggestion was declined.

That when the opinion of Judge Coxe, before 15
whom the case was tried, was handed down he sent with it a memorandum for counsel saying that while he was doubtful of his right to give a money decree as well as an injunction, yet as the ultimate relief would apparently depend upon the same proven facts he recommended that a stipulation be entered into by both parties that a money decree be entered to abide the event of the appeal, so as to avoid going twice to the Supreme Court on appeal, once in this equity suit and once in the action at law in aid of which the equity suit was brought.

Deponent asked said Kenneson and Charles N.

16 Codding, his associate, who was with him, whether the defendant would consent to this, and the reply was that the defendant would be glad to hear of a chance for two appeals, and subsequently on formal request the stipulation was declined.

Deponent further says that the questions necessary to be decided on this appeal have been frequently decided heretofore in other cases by this Court, and are therefore frivolous.

Deponent further says that said Henry A. Root informed deponent that he resides in Helena, Montana, and had severed his connection with this case as aforesaid because of bitter litigation really be-
17 tween himself and the appellant over the estate of a deceased relative.

The appellant has, since the appeal was allowed, moved in the Court below to suspend the perpetual injunction granted by the decree appealed from until this appeal is heard and decided. This motion was denied. Actions at common law, as contemplated herein, have since the appeal was taken been begun by the appellee upon the judgment involved in this case, in aid of which actions the injunction was granted. Service of the complaint has been made, but the answer has not yet been served, and deponent has been informed by counsel for Erwin Davis, the appellant herein, who is defendant in
18 said cases at law, that he is about to move therein that his time to answer be extended until the decision of this appeal. That thus it is the intent of defendant appellant to tie up this litigation for many years and delay payment of the amount due to this appellee.

ANSON MALTBY.

Sworn to before me this
11th day of July, 1891.

M. A. POTTER,
Notary Public,
N. Y. Co.

{ NOTARIAL SEAL }

SUPREME COURT OF THE UNITED STATES. 19

ERWIN DAVIS,
Defendant, Appellant,

AGAINST

ANGELICA WAKELEE,
Complainant, Appellee.

Southern District of New York, ss.: 20

ANSON MALTBY, being duly sworn, says: That he is counsel for the appellee herein.

That on the 27th day of June, 1891, deponent wrote and caused to be deposited in the post-office in New York City, a letter with postage fully prepaid, addressed to Henry A. Root, at Helena, Montana, of which a copy is annexed hereto marked Exhibit A, and that deponent sent a fully prepaid telegraphic dispatch from Chicago, July 8, 1891, addressed to Henry A. Root, Helena, Montana, of which a copy is hereto annexed marked Exhibit B; and that on deponent's return from Chicago to New York on or about July 11, 1891, he found at his 21 office a telegraphic dispatch which is hereto annexed marked Exhibit C.

Deponent further says that annexed hereto, marked Exhibit D, is the memorandum handed down by Judge Coxe, as alleged in deponent's affidavit of July 11th, herewith submitted.

That since July 11th the appellant herein has, as defendant in the action at law begun in the United States Circuit Court, Southern District of New York, against him upon the judgment involved herein by this appellee, moved the said Court to extend his

22 time to answer the complaint therein until ten days after the decisions of these motions, on the ground that he had been enjoined in this suit from setting up that said judgment is void, and that if he proceeded to trial without such defense he might be beaten and forced to pay his money before the decision of this appeal, and that if this appeal be sustained he might not be able to recover his money so paid; and he further stated that he would make a motion to advance the argument of the appeal in this Court.

Deponent represented to Davis' counsel on said motion that under the decisions of this Court no
23 such motion to advance could be granted, as there was no public question involved herein, but that deponent would ask that they submit to this Court the appeal upon printed briefs during the first ninety days of the next term, under Rule 20 of this Court, but deponent has received no word of assent from them, and believes their proposed motion to advance to be a mere ruse.

Deponent further says that on said motion in the law case Davis' counsel urged that at the time the appeal was taken he was advised that no right of appeal lay to the new Circuit Court of Appeals, but no suggestion of this was made to deponent when he asked counsel to appeal to the Circuit Court of
24 Appeals.

Counsel simply said they wanted the case heard by the Supreme Court. Deponent would have gladly stayed any action in the law cases until after the Circuit Court of Appeals for this circuit had been organized in June last so that Davis could appeal thereto, and such waiting would have been safe for Davis, for the right to appeal to the Supreme Court only expired July 1, 1891, and that to the Circuit Court of Appeals expires September 9, 1891.

Deponent verily believes that if these present

motions are denied the appellant will apply to the 25
Court in the actions at law for an extension of his time to answer until after the decision of this appeal on the regular call of the calendar, some four years hence; and thus justice will be denied to the appellee during all that time, when a speedy decision might have been had by the Circuit Court of Appeals.

That the statutory limitation of 20 years has almost run out, although the litigation has been constantly maintained, and it will completely expire before this appeal can be heard in regular order, as the appellant well knows, and deponent verily believes that the appellant desires to delay a final decision of this appeal as long as possible, so as to 26
avoid having to pay the money involved in the action at law during that time if the decree shall be affirmed, or, if it shall be reversed, to prevent the appellee from bringing a mixed action at law and equity in the State courts of New York after the present litigation shall be over.

Deponent further says that the extracts from the briefs of the defendant-appellant printed at page 45, 46 in appellee's brief submitted herewith on this motion, are correct copies of parts of briefs used by defendant in the Court below herein as described in said appellee's brief.

ANSON MALTBY.

27

Sworn to before me this 5th day of September, 1891.

FIELDING L. MARSHALL,
Notary Public,
N. Y. Co.

[NOTARIAL SEAL.]

28 **"Exhibit A."**

DAVIS *v.* WAKELEE, No. 1185.

DAVIS *v.* CORNWALL, No. 1186.

NEW YORK, June 27, 1891.

HENRY A. ROOT, Esq.

Dear Sir:

Within a day or two I have received a letter from the Clerk of the U. S. Supreme Court, saying that your name had been entered as counsel for the appellant, May 22d, 1891, in the above cases in the
29 Supreme Court. They are appeals from Wakelee *vs.* Davis and Cornwall *vs.* Davis in the U. S. District Court, So. Dist. of New York.

Please let me know whether such appearance was authorized by you, and oblige,

Yours Truly,

ANSON MALTBY.

"Exhibit B."

CHICAGO, ILLS., July 8th, 1891.

HENRY A. ROOT,
30 Helena, Montana.

Please wire answer my letter to-morrow, Auditorium, reiterating statement appearance unauthorized.

ANSON MALTBY.

Exhibit C.

31

THE WESTERN UNION TELEGRAPH COMPANY.

Received at the Western Union Building, 195 Broadway, N. Y., July 9, 1891.

Dated HELENA, MONT., 9, via CHICAGO 9.

To ANSON MALTBY,
48 Wall St., N. Y.

No such appearance authorized, but neither Choate, Codding or Kenyason can be criticised. Have written Mr. Choate about the latter.

H. A. ROOT.

32

Exhibit D.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WAKELEE and CORNWALL

vs.

DAVIS.

33

Memo. for Counsel:

I have devoted considerable time and thought to the question whether the Court in this action can award a money judgment. I agree with complainant's counsel, that if the present record discloses all there is to the controversy—as it probably does—it is unnecessary to put these parties (defendant as

well as complainant) to the expense and delay of another suit. It would seem that a stipulation might be entered into which would guard the rights of all concerned, save further expense and delay, and by permitting judgment in this action, enable the defendant to appeal to the Supreme Court, if he desires to do so, upon a record containing all the facts. An action at law may necessitate two journeys to the Supreme Court. In the absence of such a stipulation, however, I doubt the power of the Court to order such a judgment, and I am by no means sure that the complainant would be safe in accepting it, for the following reasons:

FIRST.—The bill is not framed to sustain such a judgment, and it is not easy to see how, upon the facts, it could be so framed (37 Fed. Rep., 280).

SECOND.—Judge Shipman's decision evidently contemplates an action at law. He sustains the bill as auxiliary to an action at law.

THIRD.—How can it be said that defendant has no defense to an action at law not disclosed by this record? We may infer this, but can it be judicially determined? Has the Court a right to deprive the defendant of his constitutional right to a jury trial?

FOURTH.—In view of these doubts would it be wise for the complainant to take such decree?

If, upon appeal, the Supreme Court should determine that there was error in permitting it, would it not then be too late to bring an action at law upon the judgment (*Code Civ. Proc.*, § 376)?

These considerations have led me to grant the decree as stated in the decision.

Utica, January 6, 1891.

A. C. C.

Evening Post Job Printing House—N. Y.

Supreme Court of the United States.

ERWIN DAVIS,
Appellant,

vs.

ANGELICA WAKELEE,
Apellee.

No. 1185.

Southern District of New York, ss.:

ANSON MALTBY, being duly sworn, says: That he was the solicitor for the complainant-appellee below; that on the 8th day of September, 1891, there were left at his office copies of an assignment of errors, a copy of which is hereto annexed marked "Exhibit A," and a petition for appeal purporting to have been allowed by Hon. A. C. Coxe, Judge, and a citation purporting to have been signed by Judge Coxe, returnable to the United States Circuit Court of Appeals for the Second Circuit October 5th, whereby this appellant, Erwin Davis, has appealed to the said United States Circuit Court of Appeals from the decree and decision of the United States Circuit Court for the Southern District of New York, lately rendered in the suit in equity wherein this appellee was complainant and this appellant was defendant, being an appeal involving the same questions and same subject matter as involved in this appeal, and from the same decision and decree.

The petition for appeal to the said Circuit Court of Appeals is similar to that to this Court, but re-

4 cites in addition that the appeal to this Court has been made, and says:

"This defendant further alleges, however, that "since the appeal to said United States Supreme "Court was so taken, the appellee on said "appeal has given notice of a motion before "the Supreme Court of the United States, at "a term to be holden at Washington on the "first Monday of November, 1891, to dismiss said "appeal, and united therewith a motion to affirm "the judgment or decree, on the ground that, al- "though the record may show that the said Supreme "Court has jurisdiction, it is manifest the appeal
5 "was taken for delay only, and that the question on "which the jurisdiction depends is so frivolous as "not to need further argument, and for such other "and further relief as to the Court may seem "proper. This defendant further alleges that he "anticipates that one ground, among others, on "which the appellee relies to dismiss said appeal "will be that the Supreme Court is without jurisdic- "tion of said appeal, and that this defendant ought "to have appealed to the United States Circuit "Court of Appeals for the Second Circuit rather "than to the United States Supreme Court; and this "defendant is, therefore, advised that it may be "doubtful in which court the appeal should properly
6 "be heard, and, therefore, for the sake of precau- "tion, takes this appeal to the United States Circuit "Court of Appeals for the Second Circuit."

Deponent further says that he verily believes such second appeal was made in order that if the Supreme Court should dismiss the appeal to it for *any reason whatsoever*, then the appellant could further delay the appellee until the second appeal could be heard by the Circuit Court of Appeals, and thus subject the appellee to the additional expense, annoyance and delay dependent on such an appeal, while the appellant should continue his plan, as it appears

through twenty-two years of litigation, of pursuing two or more inconsistent courses. 7

ANSON MALTBY.

Sworn before me this 16th day of September, 1891.

FIELDING L. MARSHALL,
[NOTARIAL SEAL.] Notary Public,
New York County.

"Exhibit A."

CIRCUIT COURT OF THE UNITED STATES OF AMERICA 8

FOR THE SOUTHERN DISTRICT OF NEW YORK,

In the Second Circuit.

ANGELICA WAKELEE,
Complainant,

AGAINST

ERWIN DAVIS,
Defendant. 9

And now comes the defendant, Erwin Davis, by his solicitors, Kenneson, Crain & Alling, and makes the following assignment of errors:

FIRST.—This defendant assigns as error that the Court did not decide that the defendant, Erwin Davis, was not estopped from claiming, alleging or setting up as against the complainant, Angelica Wakelee, her heirs, executors, administrators and assigns, that the judgment given, made or entered by and in the District Court of the Fifteenth Judicial District of the State of California, in and for the City of San Francisco, on November 18, 1873, in an action wherein Henry P. Wakelee was plaintiff and

said Erwin Davis was defendant, in favor of said Wakelee and against said Davis, was not duly given, made or entered by a court having competent jurisdiction thereof, is not valid or does not still stand of record in said District Court, and is not in full force against Erwin Davis, his heirs, executors, administrators and assigns and did not therefore dismiss the bill.

SECOND.—This defendant assigns as error that the Court did not decide that even though Erwin Davis was estopped, the complainant, Angelica Wakelee, could avail herself of the facts constituting said estoppel in an action at law upon said judgment of November 18, 1873, and that therefore she had an adequate remedy at law to avail herself of said estoppel, and that therefore the bill of complaint ought to have been dismissed.

THIRD.—This defendant assigns as error that the Court decided that the defendant Erwin Davis was estopped from claiming, alleging or setting up, as against the complainant, Angelica Wakelee, her heirs, executors, administrators and assigns, that the judgment given, made or entered by and in the District Court of the Fifteenth Judicial District of the State of California, in and for the City of San Francisco, on November 18, 1873, in an action wherein Henry P. Wakelee was plaintiff and said Erwin Davis was defendant, in favor of said Wakelee and against said Davis, was not duly given, made or entered by a court having competent jurisdiction thereof, is not valid or does not still stand of record in said District Court, and is not in full force against Erwin Davis, his heirs, executors, administrators and assigns.

FOURTH.—This defendant assigns as error that the Court decided that the complainant, Angelica Wakelee, could not avail herself of the facts constituting said estoppel in an action at law upon said judgment of November 18, 1873, and that therefore

she had no adequate remedy at law, and was 13
therefore entitled to resort to a court of equity for relief.

FIFTH.—This defendant assigns as error that the Court decided that the complainant, Angelica Wakelee, was entitled to an injunction restraining the defendant, Erwin Davis, his heirs, executors, administrators, assigns, attorneys, agents and servants, and each and every of them, from claiming, alleging or setting up, by answer, demurrer, plea or other defense or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form, in any action at law or suit in equity, or in any other proceeding whatever in this or any 14
other jurisdiction, and from in any manner or form whatever and wheresoever maintaining against the complainant, Angelica Wakelee, her heirs, executors, administrators and assigns, or any or either of them, that said judgment of November 18, 1873, was not duly given, made or entered by a court having competent jurisdiction thereof, is not valid or does not still stand of record in said District Court, and is not in full force against this defendant, Erwin Davis, his heirs, executors, administrators and assigns, or any and either of them.

SIXTH.—This defendant assigns as error that the Court made the decree it did in favor of the complainant, Angelica Wakelee, instead of a decree in 15
favor of the defendant, Erwin Davis, dismissing the bill.

KENNESON, CRAIN & ALLING,
Solicitors for Davis.

Supreme Court of the United States.

No. 1185.

ERWIN DAVIS,
Appellant,

vs.

ANGELICA WAKELEE,
Appellee.

AFFIDAVITS IN ANSWER TO MOTIONS TO DISMISS APPEAL AND AFFIRM DECREE.

HENRY A. ROOT,
Solicitor for Appellant.

JOSEPH H. CHOATE,
THADDEUS D. KENNESON,
Counsel.

Evening Post Job Printing House, N. Y.

Supreme Court of the United States. 1

ERWIN DAVIS,
Appellant,

AGAINST

ANGELICA WAKELEE,
Appellee.

No. 1185.

STATE OF NEW YORK,
Southern District of New York, } ss.: 2

THADDEUS D. KENNESON, being duly sworn, says: That he is an attorney and counsellor at law admitted to practice in all the courts of record in the State of New York and in the United States Circuit Court for the Southern District of New York; that he has been of counsel for the appellant Davis in this suit, ever since this action was begun by the filing of the bill of complaint, in April, 1888, in the office of the Clerk of the United States Circuit Court for the Southern District of New York. The appellant Davis appeared in this suit in said Circuit Court by Henry A. Root as his solicitor. At the time this suit was 3
begun said Henry A. Root was practicing law in New York City, and had his office at number 10 Wall street in said city. At the same time deponent had his office in the same building, on the same floor, and connected with said Root's office; and under a business arrangement at that time existing between deponent and said Root, deponent assisted said Root

4 and acted as counsel with him in all his litigated business. This arrangement and relation continued until January 1, 1890. Prior to that time, and in September, 1889, deponent became a partner in his present firm of Kennescn, Crain & Alling, but still continued thereafter, and until January 1, 1890, in his old arrangement with Mr. Root. At that time, January 1, 1980, the demurrer to the amended bill of complaint in this action had been argued and decided by Judge Shipman; the defendant Davis had answered and a replication to said answer had been filed by the complainant, and the parties were then engaged in taking proofs in preparation for the
5 final hearing.

While such proofs were being taken, in the winter of 1889–90, as deponent is informed, an uncle of said Henry A. Root and a brother of the defendant, Erwin Davis—namely, one Andrew J. Davis—died in Montana, reputed to be worth from eight to fourteen million dollars. Mr. Root shortly thereafter left New York City and went to Helena, Montana, and took up his residence there, and made a claim to letters of administration of the estate of said Andrew J. Davis. Another brother of the deceased, one John Davis, as deponent is informed, made a claim to such letters and a contest followed, in which said John Davis, was suc-
6 cessful. As deponent is informed and believes, the appellant herein, Erwin Davis, sympathized in said contest between said Root and said John Davis, with his brother, John Davis. After the decision of the lower Court awarding letters of administration to John Davis and denying them to Henry A. Root, and while an appeal was pending from said decision to the Supreme Court of the State of Montana by said Henry A. Root, a paper purporting to be a will of the deceased, was presented by John Davis for probate in Montana, and Henry A. Root and others have since contested the validity of said

will; and in said contest, as deponent is informed, the 7
sympathies of said Erwin Davis have been with his brother, John Davis. Your deponent, however, has never been informed and has never known of the existence of any bitter quarrel between said Henry A. Root and the appellant herein, Erwin Davis. After said Root went to Helena, and after his application for letters of administration had been decided adversely in the lower Court in Montana, and while an appeal from said decision was pending in Montana, and after the presentation of said will for probate, said Root came came to the City of New York and called upon deponent and requested deponent to take charge of his unfinished cases and carry them 8
through to completion.

At the time said Root left New York, and went to Helena, Montana, he had as managing clerk in his office in New York one Charles N. Codding, and as deponent was at or about the time of Mr. Root's leaving informed by said Codding, the charge of closing up Mr. Root's business was left with Mr. Codding; and under the express request of Mr. Codding, your deponent continued to interest himself in this case and to take charge of the various steps therein, and he continued so to act from the time Mr. Root left the city until Mr. Root so requested deponent, as just stated, to take charge of his unfinished cases and carry them through to completion. One reason 9
why at that time Mr. Root made said request of deponent was that Mr. Root himself was out of the city and unable to attend to his business, and Mr. Codding was so busily engaged in assisting him in the various matters in Montana relating to the estate of Andrew J. Davis, that neither of them could properly care for Mr. Root's law business in New York.

Accordingly, in this case, after the proofs had been completed, your deponent argued the case at the final hearing in the United States Circuit Court for

10 the Southern District of New York, before Judge Coxe. Thereafter, and after the decree of said Court was entered, March 9, 1891, deponent, with the full knowledge of Mr. Davis, the appellant, and acting under his personal instructions, caused a petition of appeal to be prepared and a bond on appeal to be executed, and presented the same to Judge Coxe, who on April 16, 1891, allowed the appeal, approved the bond and signed a citation, directed to the appellee, Angelica Wakelee: and thereafter deponent caused said citation and said petition of appeal to be served upon Anson Maltby, solicitor for Angelica Wakelee, and caused the record on appeal to be made up and certi-
11 fied by the Clerk of the United States Circuit Court for the Southern District of New York, and filed in the office of the Clerk of this Court in Washington. And your deponent signed a notice of appearance in this Court with the name of Henry A. Root as solicitor for appellant and sent the same to the Clerk of this Court to be entered at the time of the docketing of this case on the calendar of this Court.

Your deponent was, at the time of taking said appeal and of entering said notice of appearance, in communication with the appellant, Erwin Davis, and prepared the petition of appeal for Mr. Davis to sign and discussed the same with him. And your deponent procured the bondsman who executed said
12 bond on appeal to execute the same, at Mr. Davis' suggestion, and had the record prepared and the case docketed in this Court with the full knowledge of said Davis; and said Davis has since paid deponent's firm for the expenses of securing said record to be certified and this appeal to be docketed in this Court. These facts, of course, fully show that this appeal is taken with the knowledge and authority of the appellant personally.

During all this time, and up to the present date, deponent has never heard from Mr. Root or Mr. Davis one word to the effect that Mr. Root desired

to close his connection with this case or objected in 13
any way to appearing as counsel for appellant in this Court. No other solicitor, attorney or counsel has ever been substituted in Mr. Root's place to act for Mr. Davis in the United States Circuit Court. Deponent was informed by Mr. Codding, who was managing clerk for Mr. Root at the time he left New York, and who, as deponent was informed, took charge of Mr. Root's business, that Mr. Root's claim for services in this case had not been settled; and your deponent supposed that Mr. Root would not consent to the substitution of any attorney, solicitor or counsel in his place to act for Mr. Davis without such payment. Deponent has never to this day
heard one word from Mr. Root to the effect that his 14
appearance as counsel for Davis in this case is against his wish, or that his connection with this case has been closed; and your deponent, acting under the request of Mr. Root, hereinbefore stated, to take charge of his unfinished cases, supposed that he had a perfect right to use Mr. Root's name as he did in entering the appearance of Mr. Root as counfel for Davis in this Court on this appeal. In so using Mr. Root's name deponent did no more than he has done numerous times in other matters and cases which Mr. Root left in deponent's charge. In fact, it was absolutely necessary that deponent
should have the right to sign Mr. Root's name as 15
attorney in order to carry out his request and close up Mr. Root's business.

Your deponent denies all allegations in the moving papers to the effect that this appeal was taken by Mr. Davis for delay. This appeal was taken in April, 1891. At that time, this Court was the only court to which an appeal from the final decree in this case could be taken. The intermediate appellate tribunals known as the United States Circuit Courts of Appeal were not then in existence. To be sure, the act approved by the President, March 3d, pro-

viding for the organization of said courts and for appeals to said courts had then been passed by Congress, but there was no obligation resting on the defendant to wait until the organization of said courts in June and appeal to said courts rather than appeal to this tribunal; and, to be frank, both Mr. Davis and deponent much preferred to take an appeal to this tribunal in preference to taking an appeal to the new tribunal which was to be organized in June. Your deponent believed when this appeal was taken and still believes that the questions involved in this appeal deserve the most serious consideration that can be given to them by this Court, the highest court in this land. Your deponent believes that, had Mr. Davis waited and appealed to the intermediate tribunal, the United States Circuit Court of Appeals for the Second Circuit, ultimately it would have caused a greater delay than can possibly be caused by the immediate appeal which was taken to this Court, because your deponent believes that the questions involved herein are of such serious moment that an appeal from any decision which the intermediate court might make would have been allowed to be taken to this Court; and, instead of hastening the decision of this case, an appeal to that court would simply have delayed the decision by the length of the time necessary to determine the appeal in the intermediate Court. Your deponent is at liberty to say that Joseph H. Choate has been of counsel for Mrs. Davis since the beginning of this suit, and that he entirely agrees in the view of deponent as to the seriousness of the questions involved in the litigation, that he entirely approves of the appeal taken to this Court instead of to the intermediate tribunal, and thinks that the qustions involved are of such serious moment that this Court should decide them, and that, if an appeal had originally been taken to the intermediate tribunal, any decision that court might have ren-

dered would have been permitted to be reviewed by 19
this Court under the power conferred by the Act of March 3, 1891.

Your deponent states, in explanation of the appeal which has been taken to the United States Circuit Court of Appeals for the Second Circuit, and which is referred to in the moving papers in the affidavit of Mr. Maltby, that said appeal was taken as a matter of precaution, purely and simply, and to avoid a possible question as to the jurisdiction of this Court to entertain this appeal; but your deponent alleges that the objection to the jurisdiction of this Court, which caused said appeal, has not been raised on this motion; and your depo- 20
nent believes, and always has believed that the objection would not have prevailed; but as a matter of precaution, and to save the rights of Davis, it was thought advisable that an appeal should be taken to obviate the possibility of the dismissal of the appeal to this Court on such ground.

Your deponent, in answer to the allegation contained at folios 15 and 16 of the moving papers herein, in the affidavit of Anson Maltby, to the effect that a reply was made in answer to his question, by your deponent or by Charles N. Codding, to the effect that the defendant would be glad to hear of a chance of two appeals, says that he never made any such answer to any question of Anson 21
Maltby, at any time, on any occasion, either alone or in the presence of Charles N. Codding, and that he never heard Charles N. Codding make any such statement.

22 Your deponent further alleges that since the beginning of this action the complainant herein has begun an action upon the California judgment obtained November 18, 1873, against this defendant, on the law side of the United States Circuit Court for the Southern District of New York, Second Circuit. A copy of the complaint in said action is hereto annexed and made a part of this affidavit and marked "Exhibit A." The Court will see that in pleading the complainant has done precisely what in her bill in this case she says she could not truthfully do, namely, allege that said judgment was duly given by the California Court. The practice of
23 complainant, in strikes us, is preferable as evidence of the law in New York, to her assertions in her bill in this case.

THADDEUS D. KENNESON.

Sworn to before me this 9th day of October, 1891.

EVERETT J. ESSELSTYN,
[L. S.] Notary Public,
N. Y. Co.

24

Exhibit A.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE,
Plaintiff,

VERSUS

ERWIN DAVIS,
Defendant.

The plaintiff complaining of the defendant, alleges upon information and belief:

I.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

II.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

III.—That on the eighteenth day of November, 1873, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State.

IV.—That on the eighteenth day of November, 1873, at said City of San Francisco, one Henry P. Wakelee recovered a judgment which was duly given by said court against the defendant, by the terms of which judgment it was ordered, adjudged

and decreed, that said Henry P. Wakelee "have and recover from said defendant Erwin Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{28}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum, from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{28}{100}$ dollars, in an action wherein said Henry P. Wakelee was plaintiff and the defendant herein was defendant.

V.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw for value, and on November 9, 1886, Charles E. Laidlaw for value sold and assigned the said judgment to this plaintiff who is still the owner thereof.

VI.—That no part thereof has been paid, and the whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

Wherefore, the plaintiff demands judgment against the defendant Erwin Davis in the sum in United States gold coin of ($22,809.26) twenty-two thousand eight hundred and nine $\frac{28}{100}$ dollars, with interest at the rate of seven per cent. per annum from November 18, 1873, besides the costs of this action.

ANSON MALTBY,
Attorney for the Plaintiff.

Southern District of New York, ss.:

ANSON MALTBY, being duly sworn, says: He is the attorney for the plaintiff herein, and resides at New Rochelle, in the County of Westchester. That the

foregoing complaint is true to the knowledge of the 31
deponent, except as to those matters therein stated to be alleged on information and belief, and as to those he believes it be true.

Deponent further says that the grounds of his belief as to all matters therein not stated upon his knowledge are as follows: The possession and inspection of exemplified copies of the judgment roll entered in the action alleged in the foregoing complaint, and of records docketed in the matter of Erwin Davis, a bankrupt, in the United States District Court for the District of California, and the inspection of the documents forming the judgment roll filed in a suit in equity in the United States 32
Circuit Court for the Southern District of New York, March, 1891, wherein this plaintiff was complainant and this defendant was defendant.

Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not within the said County of Westchester, nor within the State of New York.

ANSON MALTBY.

Sworn to before me this }
22d day of June, 1891. }

FIELDING L. MARSHALL,
Notary Public,
N. Y. Co. 33

34 SUPREME COURT OF THE UNITED STATES.

ERWIN DAVIS,
Appellant,

AGAINST

ANGELICA WAKELEE,
Appellee.

No. 1185.

STATE OF NEW YORK,
35 Southern District of New York, } ss.:

CHARLES N. CODDING, being duly sworn, says: That he has read the affidavit of Anson Maltby in this case purporting to be verified July 11, 1891, which affidavit is used as one of several affidavits upon a motion to dismiss the appeal and affirm the judgment herein. Your deponent, in answer to the allegation contained at folios 15 and 16 of the moving papers herein, in said affidavit of Anson Maltby, to the effect that a reply was made in answer to his question, by your deponent or by Thaddeus D. Kenneson, to the effect that the defendant would be glad to hear of a chance of two appeals, says that
36 he never made any such answer to any question of Anson Maltby at any time on any occasion, either alone or in the presence of Thaddeus D. Kenneson, and that he never heard Thaddeus D. Kenneson make any such statement.

CHARLES N. CODDING.

Sworn to before me this 9th day of October, 1891.

EVERETT J. ESSELSTYN,
[L. S.] Notary Public,
N. Y. Co.

SUPREME COURT U. S.
FILED
SEP 2 - 1908
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

No. 1185.

ERWIN DAVIS,

Appellant,

vs.

ANGELICA WAKELEE,

Appellee.

No. 1186.

ERWIN DAVIS,

Appellant,

vs.

PIERRE B. CORNWALL,

Appellee.

BRIEF OF APPELLEES ON MOTIONS TO DISMISS APPEALS AND AFFIRM DECREES.

ANSON MALTBY,
Counsel for Appellees,
48 Wall Street,
New York.

Supreme Court of the United States.

ERWIN DAVIS, Appellant, vs. ANGELICA WAKELEE, Appellee.	No. 1185.
ERWIN DAVIS, Appellant, vs. PIERRE B. CORNWALL, Appellee.	No. 1186.

BRIEF OF APPELLEE ON MOTIONS TO DISMISS THE APPEAL AND TO AFFIRM THE JUDGMENT.

Statement.

I.—The decree below in equity was entered March 9, 1891, in favor of the complainant. The appeal of the defendant was allowed and the bond on appeal approved April 16, 1891. The citation was served

April 17, 1891, returnable May 15th, and the return day was postponed to May 22, 1891. On that day the transcript of the record on appeal was filed in this Court and at the same time the so-called appearance of Henry A. Root, Esq., as sole counsel for the defendant, appellant, was entered in this Court.

Such entry was made without the knowledge or authority of said Henry A. Root. Such so-called appearance was null and void and there has been no other appearance of counsel for appellant under Rule 9, par. 3. Upon this ground we move to dismiss the appeal.

II.—The appeal bond (Rec., p. 94) is defective in that it does not describe with sufficient certainty the decree brought under review on this appeal, as it fails to name the term at which the decree was rendered.

Upon this ground we move to dismiss the appeal.

III.—United with the first and second motions is a third motion under Rule 6, par. 5, to affirm the judgment herein on the ground that although the record may show that this Court has jurisdiction, yet it is manifest that the appeal was taken for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument and have been repeatedly decided by this Court.

And herein are involved the following facts set forth in the bill of complaint; established without contradiction on the trial, and set forth at some length in the decree.

Facts.

A judgment *in personam* void for lack of jurisdiction of the person was entered in a California State Court against said Erwin Davis, a bankrupt, before his discharge upon a claim already proved against

him in bankruptcy. When the bankrupt applied for his discharge the creditor opposed it. The bankrupt petitioned to cancel the proofs of debt and dismiss the opposition; in his sworn petition and agreed statement of facts adopting the judgment as valid, and in his oral argument asserting its validity, and the doctrine that the original claim as proved had ceased to exist and had been so completely merged in the judgment as to become a new debt created since the petition in bankruptcy was filed, and that, therefore, this new debt was unaffected by those bankruptcy proceedings; could not share in the assets; would be unaffected by the discharge if obtained; and that the creditor had, therefore, no standing in Court unless he waived the judgment.

The Court adopted these views and granted an order as requested canceling the proofs of debt and dismissing the opposition. The creditor never waived the judgment nor appealed. The bankrupt debtor obtained his discharge, turned immediately about and sought to upset the judgment as void, and has since uniformly resisted all attempts to recover on the judgment on the ground that it is void for lack of jurisdiction of the person.

For his purpose he deliberately adopted as valid a judgment void for lack of jurisdiction. He made no mistake of law through ignorance, for he had already defended in an action then pending, on the judgment by an averment that it was so void.

An action on the judgment must be brought in New York where the bankrupt resides. The creditor's assignee, the complainant, cannot obtain relief at common law because she must in her complaint aver the jurisdictional facts which never existed.

The New York Code of Civil Procedure, §532, allows, instead of such averment, an allegation that the judgment sued on was duly made or given, which in this case is not true, and it is doubted (in decisions of N. Y. State Courts) whether the Code provision

applies to pleading on foreign judgments such as this is; and this question is still doubtful, having never been decided by the New York Court of Appeals.

The complainant has no right in a complaint at common law upon such judgment to set up the estoppels making the judgment valid. A motion to strike them, as evidence, out of the complaint would be granted. Unless these estoppels are pleaded a demurrer would put a stop to this case before evidence thereof could be put in. This would leave the creditor remediless at law. The complainant has therefore come into equity for relief in aid of a proposed action at law upon the judgment, asking *inter alia* an injunction to restrain the defendant (the ex-bankrupt debtor) from setting up in any way that said judgment is not valid or was not duly made or given, and such relief has been granted by the decree. The defendant appeals, contending that he is not estopped from contending that the judgment is void either by his petition, nor by his agreed statement of facts, nor by the arguments of his counsel, nor by the order in bankruptcy adopting the judgment as valid, etc., nor by his election of remedies, and that complainant has her remedy at law, in which she can in her complaint either plead the estoppels or that the judgment was *duly given* or made. On this motion the appellee asserts that the appeal is made for purposes of delay, and that the questions involved in the appeal are frivolous and that the vital questions have often been decided by this Court.

A Fuller Statement of Facts.

It appears that Erwin Davis, the appellant, had, early during the year 1869, been contemplating becoming a voluntary bankrupt and had employed counsel six months before he actually filed his peti-

tion in bankruptcy (see evidence of this counsel, Rec., p. 84, Q. 9).

Nevertheless, he gave for value to Henry P. Wakelee promissory notes for $15,720 a few days before he filed his petition, when he must have known he could not pay them and must have intended to take *the value* for his idle promise, from which a discharge in bankruptcy would release him. This was fraud, inadvertently revealed by his counsel twenty years after date (Rec., pp. 21, H.; 46, I.).

The appellant Erwin Davis filed his petition in voluntary bankruptcy in the District Court of the United States for the Distict of California on the 11th day of September, 1869, and was thereupon adjudged a bankrupt September 30, 1869, and thereupon Henry P. Wakelee duly proved up in said proceedings certain debts or claims against Davis due from Davis to Wakelee, upon certain promissory notes; said District Court of the United States, by an order entered July 8, 1873, granted leave to said Wakelee to commence an action against Davis for the recovery of said claims (Rec., pp. 22, 46, 29, 34, 37, 68).

Wakelee, as plaintiff, July, 1873, commenced such action upon said promissory notes against Davis as defendant in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, by publication only of the summons (Rec., pp. 37, 68, 74).

On the eighteenth day of November, 1873, in said action, without any personal service of summons upon or any appearance by Davis or any proceedings by attachment or *in rem* therein, a judgment was given or made by and in said District Court of the Fifteenth Judicial District in favor of Wakelee and against Davis, by the terms of which judgment it was ordered, adjudged and decreed that Wakelee have and recover from Davis, in United States gold

coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars (Rec., p. 77).

December 23, 1875, Davis filed in said District Court of the United States a petition for his discharge in said bankruptcy proceedings (Rec., pp. 23, 47).

Thereupon, February 23, 1876, Wakelee filed in the same matter specifications of opposition to the discharge in bankruptcy of Davis, alleging therein the following acts of Davis: Concealment of books relating to his estate or effects; being a merchant and trader and not keeping proper books of account; procuring assent of certain creditors to his discharge by pecuniary considerations; influencing actions of such creditors as to discharge by such considerations; fraudulently absconding from and remaining ever since out of jurisdiction of the United States of America during his examination in bankruptcy so that he could not be fully examined after having been duly summoned to appear (Rec., pp. 34 (Ex. C), 68).

First Act of Estoppel.

The Petition.

On March 18, 1876, Davis filed in the said matter a sworn petition and notice of motion to cancel said proofs of debt and dismiss and disregard said specifications of opposition, and this petition alleged the said proof of debt and leave of Court to sue, and that said Henry P. Wakelee *commenced an action* July 19, 1873, against Davis in said State Court for the same cause of action on which he had proved up

said debt as aforesaid, and that *in due course of said action he obtained a judgment in his favor and against Davis, which said judgment still stood of record in said Fifteenth District Court, and was in full force.* Said judgment set up in said petition was that given November 18, 1873, as aforesaid (Rec., p. 36 (Ex. E and D), p. 68).

SECOND ACT OF ESTOPPEL.

Inconsistent Positions in Court.

July 20, 1876, said motion was heard by said District Court of the United States upon said petition, notice of motion and specifications of opposition, and was argued both by counsel for said Wakelee and Davis (Rec., pp. 53–66, Dep. Barnes, Naphtaly, Thompson).

In the argument Davis' counsel took a position that the judgment was valid, &c., as hereafter more fully set forth, which induced the Court to make the order of October 31, 1876, and therefore estopped Davis from afterwards denying its validity under the doctrine as to *Inconsistency of Positions.*

THIRD ACT OF ESTOPPEL.

Election of Remedies.

Davis by his conduct before the Court deliberately made choice of his remedies, and instead of meeting the charges of fraud in the specifications of opposition chose to throw the creditor out of Court on another and different ground.

He forced Wakelee to choose one of two remedies, which he maintained were inconsistent; he obtained the Court to rule that Wakelee could not cling to his position as a creditor in those proceedings with a claim duly proven, and yet hold that judgment

unsatisfied which had swallowed up and extinguished the old debt, and thus hold both a right to dividend out of the assets in bankruptcy and a right unbarred by any discharge, unprovable in those proceedings, and which could be collected out of any other property of the bankrupt.

The ten days during which Wakelee must appeal, if at all, expired without any appeal and without any stipulation by him to discharge or satisfy the judgment should Davis be discharged in bankruptcy (Dep. Thomson, Q. 17, Rec., p. 84, *infra*). He never resisted the discharge.

Wakelee, therefore, accepted the theory and judgment of the Court as induced by Davis.

Wakelee, forsooth, is bound by the doctrines of Inconsistency of Position and Election of Remedy, but Davis is above all rules, and although he made his Election of Remedy can now take an entirely different position in court!

Fourth Act of Estoppel.

Stipulation of Facts.

Davis filed in and submitted to said Court on said motion a Stipulation of Facts signed by the counsel for both parties, which commenced thus: "The following *facts* are hereby stipulated to be *correct* and *true*," and then recited the filing of said petition September 11, 1869; the said adjudication in bankruptcy; the said proof of debt; the said order granting leave to sue; the *commencement* of said *action*; the *recovery* of said *judgment*; the commencement of an action on said *judgment* in France, all prior to the filing of said petition for discharge; the removal of said action from France to England, where it was still pending; that Wakelee filed his opposition to the discharge without cancellation of his judgment or dismissal of his action in France,

and that subsequently a (the pending) motion was made to expunge the proof of debt and dismiss the opposition (see Record, pp. 67, 68).

The appellant maintains now that his statement that this judgment was obtained was a statement not of fact, but of a legal conclusion! Yet the opening words of his Stipulation of Facts recites it as a *fact* stipulated to be *correct* and *true*. This attempted distinction will be commented on hereafter.

Now, this Stipulation of Facts went a step further than the Petition. Besides agreeing that an *action* was *commenced* and that a *judgment* was *recovered*, as was alleged in the petition, it gives rise to the inference that because Wakelee had recovered since the adjudication in bankruptcy a valid judgment in which the old claim proven in bankruptcy had merged and by it become extinguished, and had become a new debt created since the adjudication, then Wakelee had no right to occupy two inconsistent positions, one as owner of a claim proved up in the bankruptcy which would be barred by a discharge if granted, and the other as the owner of a judgment for the same claim which was to remain unbarred by the discharge of the bankrupt in those proceedings, and that he should be compelled then and there to elect his remedy and abandon one of the two inconsistent positions.

This *Stipulation of Facts* constitutes the FOURTH ACT OF ESTOPPEL in this case against Davis ever contending that the judgment of November 18, 1873, is void.

But Davis went still further and did not leave his contention to the inference based on the Statement of Facts, for upon said motion it was maintained and submitted to the Court for decision by the counsel for Davis, the bankrupt, and it was thereupon and therefore decided by the said Court that the debts or claims proved up as aforesaid by Wakelee in Bankruptcy Proceedings against Davis, the bank-

rupt, had become merged and extinguished in said judgment given by said District Court of the Fifteenth Judicial District, &c., and were no longer in existence, but had become a new debt created since the filing of the petition in bankruptcy by Davis September 11, 1869, and therefore was not such a debt as was provable in said bankruptcy proceedings, and could not be barred by any discharge of Davis, the bankrupt, in said proceedings, and therefore said Wakelee had no standing in that Court to oppose such discharge, and that said original proof of debt should be canceled and the said specifications of opposition dismissed, set aside and in all things disregarded.

What the counsel said is not left to doubt.

We have the testimony of two counsel for creditor, Barnes (Record, p. 56, Q. 29, 31), and Naphtaly (Record, p. 63, Q. 26, 27), and of one counsel for the bankrupt, Thomson, (Record, p. 84, Q. 17), who agree in what was maintained by the bankrupt and opposed by the creditor on that motion. For brevity, I quote only the bankrupt's counsel:

"The Wakelee and Cornwall oppositions I moved to set aside on the ground that they had obtained a judgment in the District Court of the State of California, after the petition in bankruptcy had been filed, and that that judgment stood of record, the ground appearing in the paper itself. I drew it myself, and filed it. I based the motion on a case decided by Judge Lowell in Massachusetts, found reported in the 5th Bankrupt Registry, I think, on page 353, being entitled *In re* Gallison *et al.;* which was to the effect that a party having proved his debt in bankruptcy, and subsequently going into a State Court, and obtaining a judgment, could not file opposition, or was not entitled to file and be heard in opposition to the bankrupt's discharge, unless he filed a stipulation that he would abide by the decision of the

United States Courts on the question of discharge, but if he filed that stipulation that he would discharge the judgments in case the bankrupt obtained his discharge in the United States Courts, that he would allow them to remain. As I viewed the case at the time, it was to compel them to choose between remaining in the United States Court and depending upon defeating Mr. Davis in his discharge, or to get out of the United States Court and take their chances in the State Court under that judgment. As they had filed with their opposition no stipulation to satisfy their judgments in the State Courts, in my view they had no standing in the Bankruptcy Court, and could not have, unless the Court permitted them afterwards to file such stipulation. No such stipulation was ever filed. On the hearing of my petiiton to dismiss their opposition and cancel their debt, Judge Hoge made the principal argument on the part of Mr. Davis. Mr. Dorsey read the stipulation as to facts, which stipulation has already been introduced in evidence herein, and I think made some short argument. General Barnes and Mr. Napthaly argued it on the other side. The facts covered by the stipulation were all conceded. There was no controversy as to facts; the question before the Court was simply a legal question growing out of those facts. The question was an unsettled question even under the old Bankrupt Acts, before that of 1867. Some of the Courts had held that judgments obtained on old debts that existed at the time of the filing of the petition in bankruptcy, on which judgments had been obtained, were discharged by a discharge in bankruptcy; and others had held the reverse. And the same was true under the Act of 1867, at that time. *Judge Hoffman in those cases held that they were not discharged, and therefore dismissed the opposition.*"

The order recited no grounds of decision or points decided (Exhibit F, Cancellation, Rec., pp. 37, 68).

There was no opinion of the Court handed down.

No briefs can be found. The Judge (Hoffman, Rec., p. 67, Q. 4) could not remember the points involved or his reasons for granting the order, but he had filed his (the Judge's) Notes of the argument (*Rec., p.* 83), which showed what authorities were cited by the counsel for the bankrupt in support of his position. These authorities are all strong for the position recited above as taken by the bankrupt, and one of them is quoted by Thompson, counsel for bankrupt, in his testimony *supra, i. e.*:

In re Gallison, 5 N. B. R., 353, U. S. District Ct., Mass., where Judge Lowell said:

"For the reasons given and upon a careful examination of the decisions, I am of opinion that a judgment obtained after the adjudication in bankruptcy, creates a new debt which cannot be proven in bankruptcy, because the judgment is a merger and creates a new debt and that the judgment creditor cannot oppose the discharge because he has no provable debt and because the discharge will be no bar to the judgment.

"These creditors proved their debt before they obtained the judgment and have a standing in Court which no one has undertaken to destroy by a motion to expunge. I hold it therefore within my power to say that they may keep their proof if they will file a stipulation to release their judgment in case the final decision in bankruptcy should grant the bankrupt this discharge. This will meet the exact justice as well as the law of this case. If they shall do this within a week, I will hear the case further. If not, the objections will be dismissed."

Thus it is conclusively established without any contradiction from our opponents exactly what we maintained in our bill were the points maintained by the bankrupt, contested by the creditor, and submitted by them to the Court for decision. Now the *claims and arguments of bankrupt's counsel* form the SECOND ESTOPPEL preventing the bankrupt

from denying the validity of the judgment of November 18, 1872, and a THIRD ESTOPPEL to the same effect was formed by the bankrupt's deliberate *Choice* of *Remedies*.

He had two courses to pursue in order to obtain his discharge.

One was to meet the charges of fraud, &c., urged by the creditor in his Specifications of Opposition.

Another was to do as he did and maintain that Wakelee was not a creditor having any position in Court to oppose his discharge, because his claim was new and not provable in those proceedings.

He took the second course, we must conclude, because he could not escape from the charges made in the Specifications. He made his election deliberately. He cannot be allowed to retreat from it. He got his relief by his choice and could get it no other way.

FIFTH ESTOPPEL.

The Order.

Thereupon there was entered October 31, 1876, in said bankruptcy proceedings by said District Court of the United States a decree or order canceling said proofs of debt, and dismissing, setting aside and forever disregarding said specifications of opposition (Exhibit F, or "Cancellation," Rec., pp. 37, 68).

The FIFTH ESTOPPEL, to the same effect as the foregoing, is this Order which necessarily decided the points and matters submitted to the Court in favor of the bankrupt.

No appeal from said order or decree of October 31, 1876, was ever taken nor any further opposition to said discharge made by Wakelee or any person claiming under him (Rec., p. 57, Q. 35; Rec., p. 58, Q. 38, 39).

Davis thereafter obtained his final discharge in bankruptcy in said proceedings (Rec., p. 47, XXII.).

The granting of the Order by the Court and Wakelee's acceptance of it as final was caused by the facts constituting the estoppels before enumerated.

Thereafter, the complainant Angelica Wakelee became and now is the lawful owner of said judgment of November 18, 1873 (Rec., p. 87).

Since October 31, 1876, said Erwin Davis, the defendant, has frequently set up and claimed in sundry actions, suits and proceedings in various jurisdictions instituted between himself and the then owner of said judgment, and still claims and sets up that said judgment is void for lack of jurisdiction of the said District Court of the Fifteenth Judicial District, because said Erwin Davis was not personally served with the summons and did not appear in said action.

Said Erwin Davis has frequently threatened and still threatens to defeat recovery upon said judgment in any action, suit or proceeding that may be brought thereon by setting up that said judgment is void because of said lack of jurisdiction.

Almost as soon as Davis got his discharge he, April, 1877, applied for and obtained an order, July 10, 1877, vacating the judgment of November 18, 1873, and allowing him to plead his discharge in bar on the ground that the judgment was null and void for lack of jurisdiction and barred by his discharge (Rec., pp. 86, 82).

On appeal this order was reversed, 5th February, 1881, by California Supreme Court (Rec., p. 86).

In the action pending in England, H. P. Wakelee *vs.* Erwin Davis, brought upon said judgment in 1875, Davis had answered (Aug. 7, 1876) that the judgment was void for lack of jurisdiction, and April 19, 1877 (about a month after he got his discharge) he amended his defense by also pleading his discharge in bar, still maintaining that the judgment was void as aforesaid. Wakelee, however, replied to this defense, insisting on the validity of the judgment

and that it was not barred by the discharge (Rec., pp. 88, 89).

The appeal in California Court operating as a stay and the expense being large, the English case was discontinued on payment of £155 19s. costs by Wakelee (Rec., p. 89).

It is thus shown that Davis was, August 7, 1876, contending in England that the judgment of November 18, 1873, was void, while in California, by his petition, 18th March, 1876, his counsel, on argument of motion July 20, 1876, see notes of argument (Rec., p. 83), and the stipulation filed August 15, 1876, was asserting that it was valid. He cannot now plead mistake or ignorance. His choice was deliberate. And this shows how absurd is the claim that Davis' position, holding the judgment of November 18, 1873, to be valid, was simply a mistake of law. It was no mistake at all. He took that position, meaning to abandon it as soon as he got his discharge. He did abandon it. He acted in fraud toward the Court and toward his creditor.

The same is true as to his position that the old debt merged in the new judgment, so as to make a new debt not provable in those proceedings, and not barred by any future discharge. He intended at the time to repudiate that doctrine and he did repudiate it as soon as he got his discharge.

1882. Counsel having been requested by Wakelee to sue upon the California judgment, ignorant of what took place before the Bankruptcy Court, and of the estoppels thereby created, advised against it and in favor of a suit on the notes, on the ground that the judgment was void, and that the leave to sue granted by the Court in bankruptcy took the claims out of the bankruptcy proceeding, so that a discharge would not affect the claims. This advice was given on the authority of a case similar to this against this same defendant, then just decided by the N. Y. Supreme Court, General Term, in

McDonald *v.* Davis, 26 Hun, 53. The action on the notes was accordingly brought in 1882, and was long pending awaiting the decision of the Court of Appeals in the McDonald case. This was rendered 1887, reversing the General Term. Counsel having learned of the estoppels involved herein, discontinued the N. Y. State Court cases on paying $645 costs and allowance (Rec., pp. 52, 87), and commenced this suit.

The bill was filed April 13, 1888; defendant demurred; demurrer sustained by Judge Coxe by order of January 29, 1889; amended bill thereupon filed; defendant demurred; demurrer overruled by Judge Shipman by order of June 29, 1889; replication thereupon filed; final hearing had and final decree entered March 9, 1891, and this appeal allowed April 16, 1891; record returned and filed in this Court May 22, 1891.

First.—Motion to Dismiss the Appeal for Lack of Appearance of Counsel.

The appeal should be dismissed.

Mr. Root was the solicitor for the defendant below. The appeal was taken in his name as solicitor, but he had severed his connection with the case on account of serious differences with his client. Nevertheless, his name, unknown to him, and contrary to his wishes, was signed by some one to a notice of appearance herein entered with the Clerk of this Court.

This was no appearance by him as required by the 3d clause of Rule 9. Here was an act required to be done *at the time of filing the record, which was not done.*

The very purpose of the rule was defeated. No

counsel stands responsible to the Court for the conduct of this case. Mr. Root certainly is in no sense bound by the action of some third party who simply subscribed Mr. Root's name to the appearance.

He might as well have signed without authority the name of any lawyer admitted to this bar, unconnected with the case below, and residing in a place far distant from this district. Mr. Root now resides in Montana.

Because he was counsel in the Court below does not give him right to appear as counsel in this Court. He must first be admitted to practice here as he has been. His appearance is not a mere formal thing as it would be in the New York Court of Appeals where counsel below continue to act in higher court till substitution by order. He simply need not appear in this Court, and any unauthorized appearance in his name is absolutely void. He, by not appearing, severs his connection with the case.

An appearance of counsel being a necessary and initial step not taken at the time prescribed and not taken at the time this motion is noticed, we submit that we are entitled to a dismissal of this appeal, with costs and ten per cent. penalty.

We have nothing to do with the reasons why Mr. Root's name was entered or who is to blame. It is sufficient for this motion that it was not done by his authority or with his knowledge.

The following decisions of this Court are to the point:

"This application comes directly within the rule laid down in Hurley *v.* Jones, 97 U. S., 318. As we took occasion to say in that case, our rules requiring causes to be ready for hearing when reached are and will continue to be rigidly enforced. *We recognize no pro forma attorneys of record. Counsel who enter their appearance under the requirements of Rule 9 must understand that the Court will hold them responsible for all that such an entry*

implies until they relieve themselves from the obligation they assume by substitution or otherwise."

Alvord *v.* U. S., 99 U. S., 593.

"When this cause was reached in its order upon the docket, there being no appearance by the appellant, the appellee had him called and the appeal dismissed under Rule 16. Our rules require that upon the filing of the transcript of a record brought up by a writ of error or appeal, the appearance of counsel for plaintiff in error or appellant shall be entered (Rule 9, par. 3). *This rule was adopted for the purpose of making some attorney of the Court responsible for the due prosecution of the suit, and it was intended for something more than mere form.* Parties should understand that they are represented here by their counsel and that notice to counsel is ordinarily equivalent to notice to themselves."

Hurley *v.* Jones, 97 U. S., 318.

The importance of a formal, valid appearance is shown by the decision that it is necessary on a cross appeal, even where an appearance had been entered on first appeal for appellee.

The Tornado, 109 U. S., 110.
Hilton *v.* Dickinson, 108 U. S., 165.
The Osborne, 105 U. S., 447.

And no attorney or solicitor can withdraw after he has once entered his appearance without leave of Court.

U. S. *v.* Curry, 6 How., 106.

Second.—Motion to Dismiss because Appeal Bond is Defective.

The appeal bond (Record, p. 94) is defective in that it omits the term at which the decree was rendered.

In New Orleans Ins. Co. *v.* Albro Co., 112 U. S., 506, a motion was made to dismiss the appeal on the ground that the security bond is defective in that the judgment brought under review is not described with sufficient certainty. Combined with this was a motion to affirm.

Held, "in the matter of the description of the judgment the bond is in the form which has been much in use, except that it omits the term at which the judgment was rendered. The better practice undoubtedly is to specify the term in describing the judgment, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security.

"It is apparent from the record that the writ of error must have been sued out for delay only. * * *

"There was sufficient color of right to a dismissal to make it proper for us to entertain a motion to affirm with the motion to dismiss.

"The motion to dismiss is denied, but that to affirm is granted."

Third.—Motion to Affirm the Decree.

This is made on the ground of the frequent decisions by this Court of the questions involved in this appeal, and the consequent frivolousness of such appeal, taken as it was for delay only.

A. *The motion is properly made.*

If the Court shall deny the motions to dismiss made herewith, I submit that we have at least established color of right to such dismissal, and therefore the Court will entertain our motion to affirm.

The rule is thoroughly well settled that although the motion to dismiss the appeal may be denied where there is at least some color of right, yet a motion to affirm will be entertained and granted on proper grounds.

N. O. I. Co. *v.* Albro Co., 112 U. S., 506.
Whitney *v.* Cook, 99 U. S., 607.
Hinckley *v.* Morton, 103 U. S., 764.
School, &c., *v.* Hall, 106 U. S., 428.
Davis *v.* Corbin, 113 U. S., 687.
Walston *v.* Nevin, 128 U. S., 578.
N. O. *v.* Construction Co., 129 U. S., 45.
The Alaska, 130 U. S., 201.

This color of right may exist at the time the motion is noticed and may be removed by opposing affidavits, but still motion to affirm may be granted on ground of frivolous questions.

Micas *v.* Williams, 104 U. S., 556.

Where color of right to dismissal exists the motion to affirm will be granted on various grounds:—

Where the only question arises on facts alone the law being settled.

The S. C. Tryon, 15 Otto, 267.

Federal question first raised on appeal.

Sugg *v.* Thornton, 132 U. S., 524.
Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S., 236.

Question often decided here.

Walston *v.* Nevin, 128 U. S., 578.

Where appeal was taken for delay only in view of former decision by this Court.

The Alaska, 130 U. S., 201.

Motion to dismiss was made on the ground that there was no federal question involved. Court held it had jurisdiction, but as the federal question was decided by Court in accordance with decisions of this Court the judgment was affirmed. Here there does not seem to have been even color of right to dismissal.

Swope *v.* Leffingwell, 105 U. S., 3.

So, where there is no "ground for contending that this Court has no jurisdiction, yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only" * * * "too plain for discussion." * * * "But without putting a different interpretation on Subdivision 5 of Rule 6, from that which has hitherto prevailed, we are of opinion that the judgment in the present case must be affirmed." * * *

"This Court, in the exercise of its inherent power and duty to administer justice, ought, independently of Subdivision 5 of Rule 6, to reach the mischief by affirming the action below. This is a proper case for doing so."

The objection of lack of jurisdiction was based on the fact that the original holder of town bonds payable to "bearer" was a citizen of the same State as the town, and that his status governed that of the plaintiff, a subsequent holder.

Justice Blatchford, Chanute City *v.* Trader, 132 U. S., 210.

The appeal has been dismissed even before the record was printed, on the ground that the question has been frequently decided by this Court.

Thomas *v.* Wooldridge, 23 Wall., 283.

Also for lack of jurisdiction before printing record.

Clark *v.* Hancock, 94 U. S., 493.

Ex parte Russell, 13 Wall., 671.

The reason for these decisions is set forth therein, to wit, the crowded condition of the calendar and the injustice and expense and annoyance resulting to appellees from frivolous appeals made for delay.

Waite, *C. J.*: "This is a motion to affirm only. Our amended Rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion. Our experience teaches us that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both in its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this Court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by the unwarranted delay ought not to be overlooked."

Whitney *v.* Cook, 99 U. S. (9 Otto), 607.

The case of Central Trust Co. *v.* Seasongood, 130 U. S., p. 482, is quite parallel to the case in hand both on the subject of the estoppel and this motion to affirm.

The motion was made to dismiss the appeal on the ground that an appeal ought to have been taken from an order. This was denied on the ground that the appeal "of the whole cause" covered the order, but the decree was affirmed because the appellant was party to a decree, (evidently entered by agreement,) in a State court having the matter subject to its jurisdiction and could not attack this decree collaterally.

(This is just what Davis is in effect doing as regards the order in bankruptcy of October 31, 1876.)

It was further held in said case that it was appa-

rent that the order of the State Court under which certain certificates were issued was the result of an agreement between the parties to the suit in United States Court and that if these certificates should be held invalid the appellee could not be restored to the rights under the decree of the State Court which he surrendered for them.

Cen. Trust Co. *v.* Seasongood, 130 U. S., 482.

B. *The judgment should be affirmed on the ground that the appeal is frivolous, made on often decided points, and for delay only.*

1. *Frivolous grounds of appeal and frequent decisions of this Court.*

Treated broadly, the appeal depends upon establishing these two propositions simply:

(*a.*) That there are no estoppels in the case which work against the defendant, appellant.

(*b.*) That if there are, there is a perfect remedy at law and no need of coming into equity.

I propose to maintain the converse of these propositions and to show that the questions involved are trite and have been frequently decided by this Court adversely to appellant.

a. *The appellant is estopped by the order of October* 31, 1876, *the motion papers on which it was granted and by his Election of Remedies to deny that the judgment of November* 18, 1873, *is valid.*

What questions this order decided has been clearly shown and cannot be denied. It is unnecessary for the purposes of this motion to argue the questions whether the arguments and claims of the

counsel before the Court in bankruptcy constitute of themselves an estoppel. It is enough for our purpose to hold that the matter and law submitted to the Court in the Petition, agreed facts and arguments constituted a deliberate *Election of Remedies* by the bankrupt and formed the questions of fact and law which were decided and settled by the order.

The order itself did not show what questions were decided. So we resorted to the record (*Graham* v. *R. R. Co.*, 3 *Wall.*, 704) and to oral evidence for that purpose.

Parol or extrinsic evidence may be given to show what questions were decided where the record does not show.

Cromwell *v.* County of Sac, 94 U. S., 351.
Davis *v.* Brown, 94 U. S., 423.
Campbell *v.* Rankin, 99 U. S., 261-3.
W. A. & G. S. P. Co. *v.* Sickles, 24 How., 333.
Miles *v.* Caldwell, 2 Wall., 35.
Burthe *v.* Denis, 133 U. S., 514, 522.
Walter A. Wood *v.* Skinner, 139 U. S., 293.

It was thus orally and by the record shown that the points before the Court and necessarily decided by the entry of the order of October 31, 1878, were these:

1st. That "an action" had been "commenced." [Of course this was a holding that it was duly commenced, for if not duly commenced it was no action.]

2d. That in "due course" of that action a "judgment" was recovered. [To call it a judgment is the same as calling it a valid judgment, for, if void, it could be in no sense a judgment nor "recovered."]

3d. That such judgment "still stood of record and in full force."

All these points appeared in the moving papers and were necessarily adopted by the order granting the motion. (See Exhibit D, Record, p. 36.)

4th. That the old debts proved in bankruptcy had become merged and extinguished in the judgment.

5th. That the judgment constituted a new debt created since the original petition in bankruptcy was filed.

6th. That such new debt was not provable in those bankruptcy proceedings because it did not exist at the time of filing said original petition.

7th. That such new debt was not affected by the bankruptcy proceedings at all.

8th. That the Court in Bankruptcy had no jurisdiction over such new debt or judgment.

9th. That the creditors had therefore no standing in Court to oppose the discharge.

10th. That the discharge, if granted, could not affect this new debt evidenced by the judgment.

All these seven last points were duly before the Court for decision, and were necessarily decided by the entry of the order of October 31, 1876. That they were presented to the Court for decision, is proven by the testimony of Barnes and Naphthaly, counsel for the creditor, and of Thompson, counsel for the bankrupt, and by examining the cases cited by counsel for bankrupt on Judge's Notes of Argument (*supra*). No contradictory evidence was introduced.

Davis claims that there was no argument or dispute as to the validity of the judgment; that its

validity was simply assumed by a mutual mistake of law, and that therefore the order of October 31, 1876, which had necessarily to be based on such assumption, is not binding as a decision of such validity.

This is a very desperate defense.

As has been shown in opening statement, there was no simple assumption, but it was *agreed* that there was such a judgment. Furthermore, Davis' eyes were wide open when his counsel so agreed in California August 15, 1876 (having previously sworn to it in his petition of March 18, 1876), because his counsel in London, on the 7th day of August, 1876, plead that that same judgment was void for lack of jurisdiction.

This Court had decided, 1870, Cooper *v.* Reynolds, 10 Wall., 308, that such a judgment was void, and the same Court, in Pennoyer *v.* Neff, 95 U. S., p. 714, decided in 1877, said that decision was an "*authoritative exposition of law*" (p. 724), and that "to the same purport decisions are found in all the State courts" (p. 732), and "that a judgment which can be treated in any State of this Union as contrary to the first principles of justice and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered" (p. 732).

This decision disposes of the question. The judgment never was valid even in California.

Davis thoroughly appreciated the whole point, and made it for his own purposes.

This decision is *res judicata* and makes the rule of action for this case and these parties. A fact or controversy once decided by competent tribunal is conclusive between same parties.

Bank of U. S. *v.* Beverly, 1 How., 134.
Aspden *v.* Nixon, 4 How., 467.
Parrish *v.* Ferris, 2 Black, 606.

Cromwell *v.* County of Sac, 94 U. S., 351.
Secombe *v.* R. R. Co., 23 Wall., 108.
Bryan *v.* Kennett, 113 U. S., 179.
Russell *v.* Place, 94 U. S., 606.
Gould *v.* Evansville & R. R. Co., 91 U. S., 526, 533.

Even under an erroneous judgment, a party may justify until it is reversed.

Bank of U. S. *v.* Bank of Washington, 6 Pet., 8.

Judgment of Court of competent jurisdiction while unreversed concludes the subject matter between the same parties (U. S. *v.* Nourse, 9 Pet., 8), and cannot be affected or impaired collaterally.

Cocke *v.* Halsey, 16 Pet., 71.
Wilcox *v.* McConnell, 13 Pet., 498.
Voorhees *v.* U. S. Bank, 10 Pet., 449.
Gunn *v.* Plant, 94 U. S., 664.

A question properly involved which might have been raised and determined in former decision is barred by that decision.

Stockton *v.* Ford, 18 How., 418.
Aurora City *v.* West, 7 Wall., 82.

The order of October 31, 1878, constitutes an estoppel embodying as it does the reasoning of Davis' lawyers and his allegations of fact.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted

thus to mend his hold. He is estopped from doing it by a settled principle of law."

Citing many cases.

Railway Co. *v.* McCarthy, 96 U. S., 258, 267.

Cen. Trust Co. *v.* Seasongood, 130 U. S., 482.

This Court has decided this question of estoppel in a parallel case, Phil., W. & B. R. R. Co. *v.* Howard, 13 How., 307, where a corporation sought to defend against an instrument by showing that the corporate seal was affixed thereto without due authority (p. 318), and that it was not, sealed or unsealed, intended to be the deed of the corporation, evidence was held admissible to show that in a former suit the corporation had treated and relied upon the instrument as one bearing the corporate seal: that "on the former trial it was offered and read in evidence, and counsel stated not only to those around him, but also in conversation with the Judge, that the paper was the real contract between the parties." * * * "The plaintiff accordingly suffered a verdict to be taken against him" (p. 317).

And the Court said :

"The plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington and Susquehanna R. R. Co. This being the fact to be proved, evidence that the corporation, *through its counsel*, had treated the instrument as bearing the corporate seal and relied upon it as a deed of the corporation, was undoubtedly admissible" (p. 333).

* * * * * * *

"These decisions go much further than this case "requires, because the defendant not only induced "the plaintiff to bring this action, but defeated the

"action in Cecil County Court, by asserting and "maintaining this paper to be the deed of the com- "pany; and this brings the defendant within the "the principle of the common law, that when a "party asserts what he knows is false, or does not "know to be true, to another's loss and his own "gain, he is guilty of a fraud; a fraud in fact, if he "knows it to be false, fraud in law if he does not "know it to be true (Polhill *v.* Walter, 3 B. & Ad., "114; Lobdell *v.* Baker, 1 Met., 201).

"Certainly it would not mitigate the fraud, if the "false assertions were made in a court of justice "and a meritorious suit defeated thereby. We are "clearly of opinion that the defendant cannot be "heard to say that what was asserted on the for- "mer trial was false, even if the assertion was made "by mistake. If it was a mistake, of which there "is no evidence, it was one made by the defendant, "of which he took the benefit and the plaintiff the "loss, and it is too late to correct it. It does not "carry the estoppel beyond what is strictly equita- "ble, to hold that the representation which defeated "one action on a point of form should sustain "another on a like point" (336).

The parallel with this case is striking.

A deed has certain legal requisites, on paper or parchment, written or printed, sealed, signed, delivered, between competent parties, and must have been made without restraint.

A deed of a corporation must be duly authorized by it and made by the proper officers.

If it lacks any of these requisite parts it is not a deed.

The document in 13 How., 305, was claimed not to be sealed by authority of the corporation, and not intended to be the deed of the corporation, that is, it was never *delivered*.

Admitting this to be all true, yet the counsel had

on a former trial claimed it to be the deed of the company.

The legal conclusion that all requisites of a deed had been complied with, were asserted when it was called by counsel a deed.

Now, in our case, a judgment has certain requisites, among them that it shall have been recovered in a court having jurisdiction, otherwise it is null. Now, to call it a judgment is an assertion of the legal conclusion that the Court did have jurisdiction.

The statement that a document is a deed or a judgment (without qualification) is a statement of fact, but the legal conclusions that it possessed all the requisites of such a deed or a judgment are inseparable from such a statement.

Davis stipulated in bankruptcy that "the following facts are hereby stipulated to be correct and true," and then stated that Wakelee had obtained this "judgment."

This he called a "fact." He cannot now turn around and say this is not a statement of fact, it is a statement of a legal conclusion only.

It is equally a statement of fact and of law.

The vital requisite of jurisdiction is as inseparable from the fact of its being a judgment as the soul is from the man.

Then again the counsel in the P., W. & B. *v.* Howard case did just what we show Davis' counsel did in this case. While introducing the deed in evidence he said to the Court and others that that was the true deed. And the Court in the language cited showed the importance of this statement.

Davis' counsel did the same thing. After swearing to the entry of the judgment, he made argument to the Court relying upon its validity. If the word "judgment," as he used it in the petition and stipulation of facts, meant only "document having the form but not the vital requisite of a judgment," how

could he claim that there had been a merger of the old debts in a void judgment?

This case is certainly parallel and has decided the point that Davis cannot now take a position inconsistent with his former position, that the judgment was valid.

I again refer to Central Trust Co. *v.* Seasongood, 130 U. S., p. 482, as controlling this motion and this appeal. A motion to dismiss the appeal was denied, but the united motion to affirm the decree was granted because the appellant was party to a decree in the State Court, having jurisdiction evidently entered by consent, ordering receivers' certificates to be issued, and that this decree could not be attacked collaterally, and that if the certificates should be held invalid the appellee could not be restored to the rights under the decree of the State Court, which he surrendered for them.

Here is our parallel: The order of October 31, 1876, was entered, based on an agreed statement of facts, one being that this judgment had been entered. Wakelee accepted the order, never appealed from it, was driven from the position as creditor in bankruptcy, shared not in the assets, lost all his rights to oppose the discharge when his specifications showed his power to prevent such discharge, and now Davis collaterally attacks the order he himself induced the Court to make, and makes no offer to, and cannot restore this creditor to her old rights.

I quote decisions to show that there is no chance of reversal on this point.

It has been held over and over again by the United States Supreme Court that a party cannot make inconsistent claims as to the same subject as to same parties.

A party cannot be permitted to claim under and against the same deed (Gibson *v.* Lyon, 115 U.S., 439); cannot share in fruits of contract and complain that it was fraudulent (Henshaw *v.* Bissell, 18 Wall., 255–

269); cannot deny validity of contract and claim that other party is estopped by it (Watts *v.* Waddle, 6 Pet., 389).

Especially a party cannot change his position as to rulings and decisions in his favor or at his request.

Valid objection cannot be taken by defendant to jurisdiction of a suit removed to the Circuit Court by him under the Judiciary Act, Sec. 12. The defendant is in court by his own act.

Bushnell *v.* Kennedy, 9 Wall., 387.
Seward *v.* Comeau, 26 U. S., 438.

Party at whose instance the removal is effected is estopped from objecting that the removal was not made in time.

Ayers *v.* Watson, 113 U. S., 594; citing 104 U. S., 5, 17.

Trustees of bank to whom its property had been transferred on the expiration of its charter, and the bank itself, voluntarily appearing and contesting a suit, cannot deny the jurisdiction on the ground that the bank (the formal party) was dead in law.

McGoon *v.* Scales, 9 Wall., 23–31.

Where defendant states in answer under oath provisions of writing in his possession, he cannot complain that the Court acted on his admission without production.

(Citing 112 U. S. 405) Cavender *v.* Cavender, 114 U. S., 484.

Plaintiff cannot complain of an error in a ruling which was made at his request, and to prejudice of defendant.

Avendano *v.* Gay, 8 Wall., 376.

Party cannot take advantage of rulings upon exception in his own favor even if erroneous.

As often before decided, Bethel *v.* Matthews, 13 Wall., 1.

Where the bankrupt court order, on application of the plaintiffs, that the Sheriff should make sale of the property of a person afterwards declared a bankrupt, levied on by him and deposit the proceeds in the bankrupt court to wait its further order, the plaintiffs cannot maintain a suit against the Sheriff for paying the money into court in pursuance of the order obtained by them.

O'Brien *v.* Weld, 92 U. S., 81.

If, as is decided as quoted hereafter, a party cannot aver as a defense the unconstitutionality of a statute which he once availed himself of to his benefit, how much less can Davis avail himself of the invalidity of this judgment, when he has once maintained it as good to his own advantage? This Court has held:

"The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitation, it is a conservator, and without it society could not well go on." * * *

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect.

"Ferguson *v.* Landrau, 5 Bush. (Ky.), 230; see Ferguson *v.* Landrau, 1 *Id.*, 548; Van Hock *v.* Whitlock, 26 Wend. (N. Y.), 43; Lee *v.* Tillotson, 24 *Id.*, 337; The People *v.* Murray, 5 Hill (N. Y.), 468;

City of Burlington *v.* Gilbert, 31 Iowa, 356; B. C. R. & M. R. R. Co. *v.* Stewart, 39 *Id.*, 267." * * *

"Not to apply the the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

Daniels *v.* Tearney, 102 U. S., p. 420.

When a party has a choice of remedies, selects one, proceeds to judgment and reaps the fruit of his judgment, he cannot afterwards proceed in another suit for the same cause of action.

Kendall *v.* Stokes, 3 How., 87.

This principle that a man is bound by his election of rémedies—is bound to be consistent and adhere to his choice of positions or claims, is sustained by the decisions of California (the *lex loci*).

Himmelman *v.* Sullivan, 40 Cal., 125,

and of New York (the *lex fori*).

An estoppel by judgment may not be invoked or repudiated at the pleasure of one of the parties as his interest may require.

Brooklyn City & N. R. R. Co. *v.* Nat'l B'k of N. Y., 102 U. S., 14.

Neither can a party enjoy the rights awarded him by a judgment whether it was void or voidable and deny its force as an adjudication.

Validity is given by assent to a void judgment.

Mills *v.* Hoffman, 92 N. Y., 181–189.

When it becomes necessary to elect between inconsistent rights and remedies, the election when made will be final and cannot be reconsidered even

where no injury has been done by the choice or would result from setting it aside.

Terry *v.* Munger, 121 N. Y., 161.
Steinback *v.* Relief Fire Ins. Co. (citing 114 Mass., 175), 77 N. Y., 498.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

Swain *v.* Seamans, 9 Wall., 254, 274.

"The plea of *res adjudicata*, applies except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time."

Henderson *v.* Henderson, 3 Hare, 100, 115; cited with approval, Cromwell *v.* County of Sac, 94 U. S., 358.

"We are of opinion that the appellant is not in a condition to raise the question just stated.

"It was a party to the suit in the State Court, the decree in which provided for a sale of the entire road, &c. That decree, even if erroneous, was binding upon all the parties to the suit until modified or reversed by the Supreme Court of Ohio.

"It was not open to collateral attack by any of those parties in a separate suit brought by them in the Circuit Court of the United States after the jurisdiction of the State Court had attached."

* * * "The appellee cannot be restored to his rights under the decree of the State Court, and it would be inequitable to permit the appellant

* * * to raise any question as to the validity of the receiver's certificate which it agreed might be issued to the appellee."

"It remained quiet for nearly two years, and until after the property had been sold, and after the sale had been confirmed to those it represented, before making an issue as to the propriety or validity of the order of December 8, 1883. The bondholders are concluded, under the circumstances disclosed in the record by what their representative did, or assented to being done, in order to induce the appellee to surrender the rights secured by the judgment of the State Court."

Central Trust Co. *v.* Seasongood, 130 U. S., 482–492.

Davis waited until several months after Wakelee's time to appeal from the order of October 31, 1876 had expired and he himself had got his discharge, before he turned on Wakelee to rend him by seeking to upset and defend against the judgment as void.

Wakelee could no longer oppose his discharge nor recover the rights Davis induced him to surrender!

But a subsequent decision *contra* in a case where the subject matter and parties are different does not reverse *res judicata* in another case though erroneous.

Russell *v.* Place, 94 U. S., 606.
Campbell *v.* Rankin, 99 U. S., 261, 263.
Case *vs.* Beauregard, 101 U. S., 688, 692.
Chancellor Kent, Lyon *vs.* Richmond, 2 John Ch., 51, 59.

Consequently the subsequent decisions of the Supreme Court between other parties contrary to the decision made by the District Court in Bankruptcy October 31, 1876, do not affect the law of that case, *e. g.*, Pennoyer *v.* Neff (1877), 95 U. S.,

714, which holds such a judgment as that of November 18, 1873, in question to be void, and Boynton *v.* Ball (1887), 121 U. S., 457, in which the U. S. Supreme Court first held that a claim proved in bankruptcy does not merge into a judgment obtained upon it *intermediate* the filing of the petition in bankruptcy and the discharge so as to become a new debt not affected by the discharge.

At the date of the order in question numerous diverse decisions had been rendered by various courts on the last named point, and the law was unsettled (Opinion Shipman, *J.*, Record, p. 44).

The Court had jurisdiction.

This extends "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy. * * * To all acts, matters and things to be done under and in virtue of the bankruptcy."

U. S. Rev. Stat., § 4972.

And further it is provided that a creditor may file a specification of opposition and have the facts tried in the District Court.

U. S. R. S., § 5111.

Coit *v.* Robinson, 19 Wall., 274.

The Court had the right therefore to determine the questions presented. None of the numerous cases deciding this same point as to the merger of an old debt in a judgment recovered since the adjudication in bankruptcy contains any hint that there was no jurisdiction in the U. S. District Court to decide this question, and many of them show that the District Court actually did entertain and decide such questions affirmatively or negatively.

The order of October 31, 1876, was a final decree and binding as res judicata.

The appellant has declared that it was a mere

interlocutory order, not a decree, and not binding as an estoppel.

The only theory on which this can be held is that a mere temporary order granted on a motion is binding only until the same issues are finally determined at trial.

The defendant's counsel has hitherto said that "an interlocutory decree is practically the end of the suit, and determines the entire rights of the parties or the principles upon which those rights are to be worked out" (*Points in reply on first demurrer, p.* 8).

Now under the Bankruptcy Act, there was no other way of determining this question than by decision of the District Court. An appeal to the Circuit Court from such decision was provided for (*U. S. Rev. Stat.*, §§ 4980–4985), and the final judgment of the Circuit Court on appeal was conclusive (§ 4986).

> Graham *v.* B., H. & E. R. R. Co., 118 U. S., 161.
> Crawford *v.* Points, 13 How., 11.

No appeal shall be allowed, in any case, from the District Court to the Circuit Court, without notice given within ten days after the entry of the decree or decision (§ 4981).

> Wood *v.* Bailey, 21 Wall., 640.
> *Ex parte* Woollen, 104 U. S., 300.

It thus seems, that the creditor could not wait till the order granting the discharge was entered some months after, and then appeal and carry the case to the Supreme Court, as an appeal from a final decree.

The Supreme Court has held that the method prescribed by the Bankruptcy Act is the only mode of procedure to have a creditor's claim adjudicated, and that an appeal does not lie to Supreme Court, from Circuit Court decision, on appeal from District Court

decision as to creditor's claim (*Coit* v. *Robinson*, 19 *Wall.*, 274).

Hill *v.* Thompson, 94 U. S., 322.
Wiswall *v.* Campbell, 93 U. S., 347.

And Justices Bradley and Miller, in a dissenting opinion in that case declare that a decree like this is not a mere interlocutory decree, or order, but "has all the elements of a final decree, and belongs to a system of proceeding which has always been regarded, in England as of equitable cognizance," and the opinion of the Court clearly regards a decree like this, as terminating the controversy.

No appeal was taken. Creditor's counsel was satisfied with the decision, and was glad he lost the case (Naphtaly, Record, p. 66). The bankrupt was duly discharged without further opposition from the creditor.

As soon as he was discharged the appellant turned about, and after taking the benefit of the facts found and conclusions of law thus procured by him to be arrived at, declared and decided by the Court by the order of October 31, 1876, seeks in other actions to have these facts and these conclusions declared by courts domestic and foreign to be illegal, void, and of no binding effect.

But the rights of this complainant were fully and finally established by the order.

It remains for her to avail herself of these rights, and here we come to the second proposition.

b. *There was no complete remedy at law. Resort to equity in aid of an action at law was necessary.*

As Davis is a citizen and resident of New York the action on the judgment must be brought there.

At common law an action on a judgment fell under the classes *debit* or *assumpsit* (*Black on Judg-*

ments, Sec. 873), but it was required to state in the declaration the jurisdictional facts.

This rule is elementary.

In this case there are no jurisdictional facts. We rely on the estoppels to make valid the judgment which was originally void for lack of jurisdiction.

The jurisdiction in equity of the United States Courts depends upon the old distinctions between law and equity which existed in England before our independence, not as existing under modern State statutes.

Boyce *v.* Grundy, 3 Peters, 210.

"And as the Courts of the Union have a chancery jurisdiction in every State and the Judiciary Act confers the same chancery powers on all and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as other States."

Marshall, *C. J.*, U. S. *v.* Howland, 4 Wheat., 108.

"The remedies in the courts of the United States are at common law or in equity, not according to the practice of States courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles (*Robinson* vs. *Campbell*, 3 *Wheaton*, 212). And although the forms of proceedings and practice in the State courts shall have been adopted in the Circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit" (*Bennett* vs. *Butterworth*, 11 *How.*, 674); *Thompson* vs. *R. R. Cos.*, 6 *Wall.*, 134.

"Rule thoroughly settled that remedies in the courts of the United States are at common law, or in equity according to essential character of case

uncontrolled in that particular by the practice of the State courts."

N. O. *v.* La. Con. Co., 129 U. S., 45.
Scott *v.* Neely, 140 U. S., 106.
Broderick Will Case, 21 Wall., 520.
Holland *v.* Challen, 110 U. S., 15.

"The adequate remedy of law which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when the Judiciary Act of 1789 was adopted unless subsequently changed by Congress, and is not the existing remedy in a State or Territory by virtue of local legislation."

McConihay *v.* Wright, 121 U. S., 201.

No remedy existing at common law we had the right to resort to equity and demand a money judgment on the facts.

Marshall, *C. J.*, Riddle *v.* Mandeville, 5 Cranch, 322.

We were, however, overruled on demurrer on this point of demanding a money judgment in equity, and so we amended our bill and asked for an injunction in aid of an action at law. This injunction we

N. Y. Code Civ. Proc., Sec. 532. *Judgment; how pleaded.*

"In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction" have a ...

actually false.

We, on the contrary, maintain that a court of conscience will not compel us to do this, while it

may allow us to reach our ends that way, if no other exists.

We further earnestly contend that under the decisions cited (*supra*, p.), a United States Court of Equity will not compel us to adopt a method of pleading first instituted by the New York Code and not existing under Common Law Rules.

But, supposing equity should desire to compel such action on our part, it is *impossible* for the appellant to show that we have the *undoubted* right to do it, even under the New York Code.

On the contrary, it is extremely doubtful whether that Section 532 governs in case of actions on foreign judgments like this. The New York Court of Appeals has made no decision on the point.

So far as I can find, there are but five decisions involving the point, whether it is proper to plead that a foreign judgment was duly given.

In Hollister *vs.* Hollister, 10 How., 532 (1854), Judge Allen, Supreme Court, Special Term, said:

"It appears to be conceded that § 161 of the Code" (old Code) "does not apply to foreign judgments, and it would seem to follow from this that a general averment of jurisdiction of a foreign tribunal would not be sufficient."

In *McLaughlin* vs. *Nichols*, 13 *Abb. Pr.*, 244 (1861), Supreme Court, General Term, said on demurrer:

"The complaint contains no averment of any facts to give jurisdiction to the court in which the judgment was rendered. * * *

"The complaint cannot be vindicated by the Code, since it does not conform to the rule given by section 161, if that applies to foreign judgments or judgments of another State, which has been doubted."

Judge James, Supreme Court, Special Term (1864), held, that Section 161 did apply to foreign judgments in *Halstead* vs. *Black*, 17 *Abb. Pr.*, 228. Seventeen years later in *De Nobele* vs. *Lee*, 47 *N.*

Y. Superior Reports, 372 (1881), the General Term of the N. Y. Superior Court said, "Whether Section 161 of the Code applied to foreign judgments of another State has been doubted (Hollister *vs.* Hollister, 10 How., 532; McLaughlin *vs.* Nichols, 13 Abb. Pr., 244), and as section 532 of the Code of Civil Procedure is simply a re-enactment of section 161 of the preceding Code, the doubt attaches to that."

The last case was an opinion (1882) by the Supreme Court, General Term, in *Horton* vs. *Shipherd*, 14 *Weekly Dig.*, 453.

There the Court makes no decision of the point. What it said was *obiter*, as follows:

"Held. The plaintiff seems to have relied upon the constructive admissions of the answer for the purpose of making out his case. It was neither alleged that the judgment was duly recovered (which would have been sufficient under the liberal provisions of the Code), nor that jurisdiction in any form had been required by the Court rendering it over the defendant or the subject matter."

A complaint, which recited that a foreign judgment was duly given was not before the Court. It was unnecessary and therefore *obiter* to say that such a pleading would be correct.

We have thus in one case a decision at Special Term allowing a foreign judgment to be pleaded as "duly given."

We have also an *obiter* of a General Term that it may be so pleaded.

We have a decision of a Special Term and decisions of two General Terms of coequal jurisdiction, one of the Supreme Court and one of the Superior Court, wherein it is *doubted* whether a foreign judgment can be so pleaded.

Now, who is to say what is the law in view of these contrary opinions? Will this Court decide that we must take the risk and seek justice at law relying

on this assurance of what is the law by our adroit opponent, who will certainly contend to the contrary in such court of law, and try to get the Court of Appeals to sustain his view?

He has done this in the past. He maintains his right to do it. He will do it in the future.

Twice on a point of doubtful law in this very matter has the United States Supreme Court subsequently decided contrary to the position taken by Davis, adopted by the Court and binding on us.

These decisions were:

(1877) *Pennoyer* vs. *Neff*, 5 *Otto*, 714.
(1887) *Boyaton* vs. *Ball*, 121 *U. S.*, 457.

And on these decisions he relies to defeat us on the points that the judgment was void and that the old debts did not so merge as to be a new debt not barred by the discharge in bankruptcy.

Why should we be compelled to go out of equity on a doubtful point like this, to accept this suggestion of the defendant, when he will immediately turn upon us and seek to rend us?

Does not *Drexel* vs. *Berney*, 122 *U. S.*, 241, protect us and say we shall not be compelled to take this course which so many State decisions have declared to be *doubtful*?

See also

Boyce vs. *Grundy*, 3 *Pet.*, 210, 215.

There was no way at common law by which estoppels such as these could be pleaded in a declaration so as to be available in place of the jurisdictional facts.

"The plaintiff cannot be said to have opportunity to plead an estoppel, and voluntarily to omit to do so, when the previous pleadings are such that if he did plead it, it would be demurrable."

Phil., W. & B. R. R. Co. *v.* Howard, 13 How., 305, 336.

The appellant, by his brief, at the trial contended otherwise, and will doubtless do so on this motion, but he has during the progress of the case four times previously admitted our proposition, as follows:

In his first Brief on Demurrer, p. 20, he says:

"Perhaps it is true, as stated by the complain-
"ant's counsel upon the oral argument, that under
"the rules of pleading in this State the complainant
"would not be permitted to plead the facts which
"constitute this estoppel."

In his second Brief on Demurrer, p. 10, he says:

"The jurisdiction, however, of the Court of Law
"to entertain the suit must be found in the facts
"other than the estoppel, and for the purposes of
"determining the jurisdiction of the Court the
"estoppel must be laid out of consideration.

"The same is equally true in a suit in equity,
"provided no equitable relief by decree is asked or
"got by reason of the estoppel. The only right
"complainant has to set out the estoppel in the
"bill of complaint is because it does form the basis
"for asking and securing equitable relief by way of
"decree. If the estoppel is set out in the bill for
"any other purpose, as, for example, to secure
"some advantage during the progress of the suit,
"then complainant has no more right to set out the
"estoppel in his bill of complaint than he has to
"set it out in a declaration or complaint in an ac-
"tion at law.

"If the estoppel is not set out as the basis for a
"decree granting equitable relief, then it is imma-
"terial, and so should be stricken out of the bill,
"just as it should be stricken out of a complaint in
"an action at law; and we submit that correct prac-
"tice would require this Court, on motion, to strike
"out the facts pleaded as an estoppel in each of
"these bills, since complainant asks no equitable
"relief, but only a money judgment."

In his third Brief on Demurrer, p. 43 he says:

"The defendant would then be in default; but "how could the Court give judgment? As com- "plainant says, if he truthfully sets out the facts, "and this Court is bound to assume that he will, "then the complaint shows on its face that com- "plainant has no cause of action at law, and the "Court will have to dismiss the complaint. If the "Court did not, but should enter judgment, the "judgment would be void and could not be en- "forced."

And on the same Brief, p. 44, he says:

"So long as the complainant has no cause of "action at all, neither this Court nor the court of "law can aid him. The court of law must, of its "own motion, insist upon the want of a cause of "action, and, if it should not, no judgment entered "upon the complaint would be enforcible, and not "only this Court, but also the court at law, would "have accomplished nothing—this Court in grant- "ing an injunction and the court of law in entering "judgment. We repeat, then, that this Court can "do nothing for complainant which the law court "cannot in the action at law itself do for him; the "want of an effectual remedy is no greater in the "law court than it is here. In truth, it is the "same, and arises from the utter want of any "cause of action at law. In such a case, whether "defendant is or is not estopped, is immaterial, and "the law court must dismiss the complaint, and "this Court cannot restrain the law court from so "dismissing the complaint."

So, too, in his fourth Brief on Demurrer, p. 4, he states:

"He (complainant) alleges that the estoppels "cannot be made a part of the statement, and that, "therefore, the cause of action must be upon the "judgment alone, and this certainly bears out to "the letter the assertion made by us in our brief."

And Judge Shipman's opinion shows how the defendant-appellant has shifted his ground as follows:

"The ground of equity in this part of the case is the averment which was once conceded by the defendant in argument to be true, and which we therefore assume to be true, that in an action at law upon a judgment in the State of New York it is necessary to allege in the complaint either the facts showing the jurisdiction of the Court in which the judgment was entered or that it was duly entered, and unless this is done the complaint will be dismissed on demurrer. It thus appears that it is uncertain whether Cornwall [Wakelee] could so frame his complaint as to be able to obtain a standing in a court of law unless Davis should be prevented from taking advantage of the defective jurisdiction of the California Court and that it is improbable that the plaintiff could, at the outset of his case, avail himself of this estoppel so as to gain a foothold in Court.

It follows that a case is stated in that part of the bill which relates to the defense of the invalidity of the judgment which entitles the complainant to relief in a court of equity (Drexel *vs.* Berney, 122 U. S., 241)." (Rec., p. 43.)

And the report of the case just cited closes with this remark: * * * "And because it appears to be altogether uncertain whether the appellants can avail themselves in the action brought against them at law of the defense asserted in this bill and admitted by the demurrer to be true, we think the demurrer should have been overruled and the defendant required to answer."

And lastly on the oral argument before the Court on the trial he again stated that the facts constituting the estoppels could not be stated in the complaint, and, if they were, could be stricken out on motion as being mere evidence.

He has repudiated, however, his former opinions

in his brief submitted at the trial, because in his extremity he found it necessary to do so.

Now, it is quite evident that his law is doubtful to his own mind.

Well, if the law is doubtful even to him, will not *Drexel* vs. *Berney supra* excuse us from being relegated to *doubtful* pleading?

We rely upon it to do so.

The defendant has quoted the N. Y. Code of Civ. Proc., § 481: "The complaint must contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition."

Now the Code governs both equity pleading and pleading at law.

It also declares (§ 532) that in suing upon a judgment the jurisdictional facts must be set forth (according to the common law system) or the judgment may be simply stated to have been duly made or given (a new provision in derogation of the common law).

This last provision is specific. We cannot take a general rule like the first and say that it overrides the second, which is specially applicable to suits upon judgments. If we cannot set up either jurisdictional facts or that the judgment was duly given, would the estoppel save us under Code, § 532?

We also maintain that this provision, Sec. 481, will not control a United States court of equity and cause it to refuse us relief, because the rule laid down in Sec. 481 did not exist at common law, and, therefore, cannot be considered herein. [See cases cited, *supra*.]

I have thus shown that there is no point involved in this appeal and necessary to its determination that has not been repeatedly decided by this Court adversely to the appellant.

2d. *The appeal was taken merely for purposes of delay.*

This may readily be deduced from the fact just shown that there are no points of law involved in this appeal which have not often been decided in other cases by this Court, and that the appeal is hopeless, as well as from the conduct of appellant throughout the whole twenty-two years of this litigation. The long delay of nearly four years necessary after an appeal to this Court before a

N. Y. CODE CIV. PROC., SEC. 3339. *Distinctions of actions of law and in equity abolished.*

"There is only one form of civil action. The distinctions between actions at law and suits in equity, and the forms of those actions and suits have been abolished."

And yet it has been held that such distinctions have not been abolished except chiefly as to form. Cases are still tried at law and in equity.

Reubens *v.* Joel, 13 N. Y., 488.

The relief demanded in the complaint does not necessarily characterize the action or limit plaintiff's remedy. Demand of judgment for damages does not preclude the recovery of the same amount by way of equitable relief.

Hale *v.* Omaha Nat. Bank, 49 N. Y., 626.
Williams *v.* Slote, 70 N. Y., 601.
Murtha *v.* Curley, 90 N. Y., 372.

"The mere fact that the complaint asks for a money judgment does not necessarily show that the case is one for trial by jury. Courts of equity give judgment for money only where that is all the relief needed (Murtha *v.* Curley, 90 N. Y., 372)."

Beil *v.* Merrifield, 109 N. Y., 202.

years to squander or secrete his fortune and leave us at the end of the litigation, years hence, with victory ours, but a victory perhaps as worthless as the apples of Sodom, and a debt based on the appellant's fraud delayed and practically rendered uncollectible by the mere forms of justice!

In this case all the questions presented on this appeal have been decided over and over again by this Court. Appellant had ample opportunity to appeal to the Circuit Court of Appeals. He says he was advised that at the time he appealed (April 16th) he had no right of appeal to the new Court. However this may be, his counsel had been urged by me to appeal to that Court to save time, and he well knew that we would consent or could be compelled to take no steps in our actions at law that would injure him during his delay in appealing until June 15th when the Court was actually organized. (If that was what was necessary before he could appeal to that Court.) If the Court by any accident had not organized June 15th, Congress had protected him by allowing him till July 1, 1891, in which to appeal to this Court.

The new Court must have followed the oft-repeated decisions of this Court. This Court will not reverse those decisions so often made. He could get no more and no different justice from this Court than from the Circuit Court of Appeals.

His appeal to this Court was simply in order to add three years to the delay of the justice we seek, and could have had no other result.

His pretended desire to advance this cause for argument before this Court only came after he was forced to it by the service of the first papers on this motion. It is a mere discharge of blank cartridges. He knows this Court would not grant such a motion, as the questions involved are all of a private nature.

If he agreed to submit the appeal on printed briefs during the first ninety days of this term it would

look better, but even then it would come because compelled.

3d. *The objections to the evidence should be overruled.*

The objections Rec., p. 50, and the first on p. 51 were made to the admission of extracts from defendants' briefs used before last amendment of complaint, introduced to show defendants' threats, &c.

They were properly introduced. In equity facts occurring up to time of decree can be proven; not so at law, where the judgment speaks from the commencement of action.

Besides the same evidence appears all through the case.

The last two objections Rec., p. 51, and that on p. 53) are of no weight. The records of the other suits were introduced (Rec., p. 87) without objection. The evidence of Maltby is simply explanatory of them.

The objections Rec., pp. 56, 57, are not important. Witness could not be expected to remember exact language of counsel twelve years after date. His memory is corroborated by defendant's witness Thompson (Rec., pp. 84–5).

The evidence was material and relevant to explain the questions of law submitted to the Court for decision of October 31, 1876, which did not fully appear in the record.

The objection (Rec., p. 59) to the introduction of the transcript of the action in California State Court showing how Davis turned about after obtaining his discharge, and sought to overturn as void the judgment which he had maintained as valid and persuaded the Court to so decide, is so evidently without strength that it need not be argued. The testimony reaches the heart of the litigation.

The matter objected to (p. 60) goes to show that

Wakelee was diligent, and coupled with the long tying up of the California case on appeal till 1881, justifies Wakelee in discontinuing a case distant one-quarter round the globe from him.

The objection Rec., p. 63 is the same as those on pp. 56, 57, and is overcome in the same way.

So also the first objection (Rec., p. 64).

The objection to Q. 32, p. 64, is an objection to a question of no importance to the rendering of the decree.

The objection Rec., p. 67 to the introduction of the notes of argument is plainly futile in the face of the numerous decisions cited in this brief holding that where the record does not show what questions are submitted and decided by an order or decree extrinsic evidence may be given.

4th. *Ten per cent. damages, interest and costs, should be awarded upon the affirmance or dismissal of this appeal.*

This is allowed by Supreme Court Rule 23 upon money judgments.

Whitney *v.* Cook, 99 U. S., 607.
Palmer *v.* Arthur, 131 U. S., 60.
Sire *v.* Ellithorpe Co., 137 U. S., 579.
Wilson *v.* Everett, 139 U. S., 616.
Prov. Wash. Ins. Co. *v.* Hushberger, 12 Wall., 164.
Hennessy *v.* Sheldon, 12 Wall., 440.
Hall *v.* Jordan, 19 Wall., 271.
Amory *v.* Amory, 91 U. S., 356.

"This (rule) gives us authority to adjudge damages for delay on appeals as well as on writs of error, and our power is not confined to money judgments only."

Gibbs *v.* Diekma (1880), Book 26, U. S. Supreme Court Rep. (L.C. P. Co. Ed.), 177.

"We can adjudge damages * * * in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals and writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time."

Amory *v.* Amory, 91 U. S., 356.

I submit that ten per cent. damages would be a just award to this appellee who has been compelled to follow this appellant for twenty-two years in many courts in many lands, and has been kept out of her just dues, by adroitness of counsel and technicalities and expenses of the law while justice cries out at these vexatious delays.

The evident design of the appellant is to delay still many more years during this appeal and such appeal as he may take from the judgment in the action at law in which he has not yet even answered.

Although no money decree has been awarded, yet the amount of the judgment involved with accumulated interest affords a subject for computing damages as readily as would a money decree in this suit, and the justice of the case is the same.

The amount involved in this Wakelee case, principal and interest to November 18, 1891, is $51,548.

Respectfully submitted,

ANSON MALTBY,
Counsel for Wakelee, Appellee.

(over)

DAVIS
vs.
CORNWELL.
No. 1186.

The motions in the case of Erwin Davis, appellant, *v.* Pierre B. Cornwall, appellee, No. 1186, are identical with those in the Wakelee case, upon practically identical facts, and are governed by a stipulation that the appeal therein shall abide the decision of this appeal. The judgment for $17,043.52 and 7 per cent. interest was entered December 18, 1872.

The amount involved in the Cornwall case, principal and interest to December 18, 1891, is $39,710.

ANSON MALTBY,
Counsel for Cornwall, Appellee.

Supreme Court of the United States.

No. 1185.

ERWIN DAVIS,
Appellant,

vs.

ANGELICA WAKELEE,
Appellee.

No. 1186.

ERWIN DAVIS,
Appellant,

vs.

PIERRE B. CORNWALL,
Appellee.

BRIEF OF APPELLANT ON MOTIONS TO DISMISS APPEALS AND AFFIRM DECREES.

HENRY A. ROOT,
Solicitor for Appellant.

JOSEPH H. CHOATE,
THADDEUS D. KENNESON,
Counsel.

Evening Post Job Printing House, N. Y.

Supreme Court of the United States.

ERWIN DAVIS,
Appellant,
AGAINST
ANGELICA WAKELEE,
Appellee.
(No. 1185.)

ERWIN DAVIS,
Appellant,
AGAINST
PIERRE B. CORNWALL,
Appellee.
(No. 1186.)

BRIEF OF APPELLANT ON MOTIONS TO DISMISS APPEALS AND TO AFFIRM JUDGMENTS.

Statement.

The appellee in each of the two above-named cases makes a motion to dismiss the appeal therein and to affirm the judgment.

The facts in the two cases are practically identical, and the questions involved on the motions are identical; and, therefore, we shall argue the motion in the first case only.

The motion to dismiss is based on two grounds: (1) that the appearance in this Court of Henry A. Root as solicitor for the appellant, which was entered at the time the transcript was filed, May 22, 1891, was not authorized by him; that, therefore, there was, in reality, no appearance of counsel for appellant; (2) that the appeal bond is defective, in that it does not describe with sufficient certainty the decree appealed from.

It is clear, however, that the motion to dismiss is not inspired by the hope of success. It is intended merely as a peg on which to hang a motion to affirm the judgment.

This motion to affirm, to quote counsel's language, is made "on the ground of the frequent decisions by this Court of the questions involved in this appeal and the consequent frivolousness of such appeal, taken as it was for delay only" (Brief, p. 19).

This action is an appeal to the *auxiliary* jurisdiction of equity. The bill was brought in aid of a contemplated action at law. The contemplated action was to be upon a *void* judgment obtained in a State Court in California in 1873.

In July, 1873, one H. P. Wakelee, appellee's predecessor in title, began an action upon certain promissory notes against Erwin Davis, in the District Court of the Fifteenth Judicial District of the State of California in and for the City of San Francisco. At that time Davis was no longer a resident of California. He was served by publication of the summons under the then laws of California; and on November 18, 1873, without personal service of summons upon Davis, and without his appearance in said action by attorney or in person, and without his answering or demurring to the complaint therein, and without any proceedings by attachment or *in rem* therein, judgment was entered against Davis in favor of said H. P. Wakelee for $22,809.26, with interest at 7 per cent. until paid.

This judgment is *void* under the decision in *Pennoyer agst. Neff*, 95 U. S., 714.

The bill of complaint in substance alleged that the complainant intended to bring an action at law upon that California judgment in the State of New York, where Davis resided ; that to this contemplated action Davis had two defenses : (1) that said California judgment is void for want of jurisdiction in the California Court to grant it, that Court never having had jurisdiction of the person of Davis ; (2) a discharge in bankruptcy obtained by Davis subsequent to said California judgment.

The bill alleged that Davis threatened to make use of both of said defenses in any action at law on said judgment.

The bill further alleged facts which complainant claimed should be held to estop Davis from insisting upon either of said defenses in said contemplated action.

The reason alleged for coming into a court of equity was that she could not in New York, where she was going to bring her contemplated action, make use in the law action of the facts which she claimed constituted such estoppels.

The ground of this inadequacy of remedy at law was thus alleged in paragraph XXXIII. of the amended bill (Record, fol. 53): "That under the law of the State of New York, where said action is to be brought, in an action at law to recover the amount due upon said judgment, the facts subsequent to said judgment, as hereinbefore set forth, and constituting the estoppels as herein claimed and insisted upon, may not be pleaded in the plaintiff's complaint as or in aid of a cause of action, but that such action must be brought upon such judgment alone, and that by the law of the said State of New York it is necessary, in an action at law upon such judgment, to allege in the complaint either the facts

showing the jurisdiction of the Court in which the judgment was entered or that the judgment was duly entered, and that, unless this be done, the complaint would be dismissed on demurrer; that your oratrix is unable truthfully to allege in such complaint such jurisdictional facts or that such judgment was duly entered, and that your oratrix is thus remediless in an action at law to maintain her rights under said judgment and under the facts hereinbefore set forth."

The relief asked was an injunction against Davis restraining him from claiming in said contemplated action upon said California judgment, that said judgment is void, and also restraining him from setting up as a defense thereto his discharge in bankruptcy.

After answer and replication and a hearing upon the pleadings and proofs, complainant obtained a decree restraining Davis from insisting upon the invalidity of the California judgment; but the Court refused to restrain Davis from setting up his discharge in bankruptcy as a defense in said contemplated action.

The Court decided that the facts alleged and proved estop Davis from insisting that the California judgment is void for want of jurisdiction in the California Court to grant it, and granted an injunction on the ground that complainant, in the contemplated action at law, could not avail herself of said facts constituting said estoppel.

The Court declined to decide whether the facts alleged and proved estop Davis from using his discharge in bankruptcy as a defense in said contemplated action at law. The reason for refusing to decide this question was that complainant in said action at law could adequately avail herself of the facts alleged to constitute such estoppel, and therefore it is for that Court to pass on the question of estoppel.

Said decree was entered March 9, 1891. Davis appealed therefrom to this Court April 16, 1891, and the record was filed in this Court May 22, 1891.

It is this appeal which appellee Wakelee is now seeking to dismiss, and this decree which he is seeking to affirm.

We agree with counsel that the appeal herein depends upon the two propositions set forth at p. 23 of his brief:

(*a.*) That there are no estoppels in the case which work against Davis.

(*b.*) That if there are there is a perfect remedy at law, and no need of a resort to equity.

After first discussing the motion to dismiss, we shall discuss these questions in the order in which appellee's counsel discusses them; and we are as confident, to say the least, that this Court will not regard these questions as frivolous, as is appellee's counsel that it will.

BRIEF.

Motion to Dismiss.

The motion to dismiss should be denied.

(*a.*) The first ground stated for this motion is that no apppearance of counsel for appellant in this Court was entered upon the filing of the transcript of record, May 22, 1891.

The Court will not dismiss without giving an opportunity to substitute other counsel.

In fact the appearance of Henry A. Root as counsel for appellant was actually entered May 22, 1891. The point made by appellee is that said appearance

was unauthorized by said Root, that said appearance was no appearance in point of law, and that, therefore, the result is the same, for the purposes of this motion, to dismiss, as if no appearance had been entered.

Let us go the length, for argument's sake, of admitting appellee's point. It does not follow, therefore, that this Court will grant this motion, at least, without first giving the opportunity to appellant to secure the entry of the appearance of other counsel in this Court in place of said Root.

There is *no* question made but that this appeal is *authorized* by the *appellant* Davis. No such question could be made. Davis verified the petition praying for this appeal (Record, fols. 201–213), and signed the bond which was approved by Judge Coxe at the time he allowed the appeal (Record, fol. 199). It would be strange, indeed, if a client who wishes to take an appeal should be dismissed from this Court because, after he has taken his appeal, and in compliance with the rule of this Court, has entered the appearance of his solicitor in the Court below as his counsel here, his solicitor says his appearance was unauthorized.

This Court will certainly give an opportunity for the substitution of other counsel in the place of Mr. Root. It will not dismiss.

So far we have assumed the truth of the facts and of all the facts set out in the moving papers.

Evidence of unauthorized appearance insufficient.

It strikes us, however, that the evidence presented to this Court of the want of authority by appellant to enter the appearance of Root as his counsel in this Court is slight indeed.

Maltby says that Root informed him that he resides in Helena, Mon., but when or how Root so informed him does not appear.

Maltby says that on June 27, 1891, he sent a letter to Root at Helena, Mon., and a copy of said letter is set out at folios 28 and 29 of the motion papers.

To this letter he seems to have got no response; for on July 8, 1891, he sent a telegram from Chicago to Root at Helena, Mon., and on his return to his office in New York he found a telegram purporting to come from Henry A. Root; and this telegram is the evidence on which is based the assertion that the appearance of Root as counsel in these cases was unauthorized.

We do not care to be captious, but admitting the genuineness of the telegram, it is possible that it may be true and yet no authority for the position of appellee on this motion.

In his letter of June 27, 1891, Maltby describes the appeals as being appeals from cases in the United States *District* Court, Southern District of New York. There never have been any cases in the *District* Court in which Mr. Root has been engaged for appellant, and no appeals from any cases in that Court have ever been taken to this Court, so that it is perfectly possible that Mr. Root may have telegraphed that no appearance in such appeals was authorized, without in any way questioning the authority to use his name as counsel on these appeals, which are in cases in the United States *Circuit* Court, in which cases he was solicitor for appellant.

But we insist that a telegram which is in no way proved to be authentic, or to have been authorized by Root, is but slight evidence on which to base a motion to dismiss these appeals. Surely, on a motion fraught with such grave consequences to Davis as is this motion, the Court ought to exact more evidence of a want of authority for Root's appearance than is presented on this motion.

Besides, it must be taken into account that there has been an ample opportunity to obtain such evidence. The notice of motion is dated September 5,

1891. The letter of Maltby was written June 27, 1891. The telegram of Root is dated July 9, 1891. There certainly was ample opportunity between July 9th and September 5th to have obtained the affidavit of Mr. Root.

Appellee cannot take advantage of unauthorized appearance.

We take the further point that, even assuming Root's appearance wholly unauthorized, yet appellee cannot take advantage of that fact. An appearance has been entered. If counsel has quarreled with his client and no longer wishes to represent him, he has his remedy and can secure the substitution of other counsel in his place; but, until that is done, this Court is bound to assume the appearance authorized, and appellee cannot question it.

Appellant had right to enter Root's appearance without authority.

Furthermore, we claim that, even though Root did not authorize his appearance, yet his client had a right to use his name and to enter his appearance in this Court, until Root had severed his connection with the case by substituting other counsel in his place.

The affidavit of Kenneson, in answer to the motion, shows clearly the circumstances under which Root's name was used and the reason for entering his appearance here.

Root had been solicitor for appellant in the Court below. No substitution of other solicitors, attorneys or counsel in his place had ever been made, and it is very doubtful whether he could arbitrarily say that his connection with the case was closed and appellant should be left in the lurch to seek other counsel before any substitution in his place.

The question of the right of counsel to sever his connection without substitution of other counsel was considered in *United States agst. Curry*, 6 How., 106.

There the motion was one to dismiss an appeal on the ground, among others, that the citation of appeal had not been served as required by law. The citation had been served on one Hanmer in person, said Hanmer's name appearing on the docket as attorney for Curry. The affidavit of said Hanmer was filed on the motion, stating that he was not at the time of the service of the citation on him their attorney—that his fee had been paid and that he had been discharged from all duty as attorney or counsel for the parties, and had so informed the marshal at the time of the service.

Chief Justice Taney, in discussing the validity of the service, says at p. 111: "So, too, as to the service of the citation on the attorney. It is undoubtedly, good and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name, after he has once entered it on the record without the leave of the Court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial with the sanction of the party, express or implied, to withdraw his name after the case was finally decided. For, if that could be done, it would be impossible to serve the citation where the party resided in a distant country, or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the Court was held. And, so far from permitting an attorney to embarrass

and impede the administration of justice by withdrawing his name after trial and final decree, we think the Court should regard any attempt to do so as open to just rebuke."

Of course, it may be said that this authority is not applicable to the case at bar; because this appeal is in a *different* court from the court where Root was solicitor, and that the case quoted has reference only to a continuance in the same court.

We doubt this distinction. It seems to us that counsel cannot arbitrarily withdraw without substitution and leave his client to seek other counsel to perfect an appeal.

We claim: (1) that even though the appearance of Root in this Court as counsel for appellant was unauthorized by him, yet the appellee cannot take advantage of it; it is a question between Root and his client alone; (2) that there is no evidence before this Court on this motion that the appearance of Root as counsel on these particular appeals is unauthorized; (3) that as no substitution has ever been had of counsel for appellant in lieu of Root, the appellant had a perfect right to enter the appearance of Root in this Court, as counsel, in the manner in which he did; (4) that if this Court should not agree with the foregoing propositions, it certainly will not dismiss without giving the appellant an opportunity to enter the appearance of other or additional counsel, as he may be advised.

This Court has decided that it will not dismiss an appeal for want of a bond as security, without first giving the opportunity to furnish such a bond. *A bond is required by statute*, and certainly is as vital as the appearance of counsel, which is a matter of rule of Court.

See Brown *v.* McConnell, 124 U. S., 489.

Failure to return with a writ of error an assign-

ment of errors, which is also a statutory requirement, is not ground for dismissal.

Gumbert *v.* Pitkin, 113 U. S., 545.
School Dist. of Ackley *v.* Hall, 106 U. S., 428.

Certainly if this Court will not dismiss for such grounds, it will not for the non-appearance of counsel, when all other steps have been taken.

(*b.*) The second ground stated for this motion is that the appeal bond is defective, in that it does not describe with sufficient certainty the decree brought under review on this appeal, as it fails to name the Term at which the decree was rendered.

Counsel cites *New Orleans Ins. Co. against Albro Co.*, 112 U. S., 506.

The very citation made by counsel in his brief (p. 19), shows that this Court does not consider such an omission fatal, and that, before dismissing the case on that account, it will give opportunity to furnish new security.

(*c.*) It is perfectly clear that in seeking grounds for a motion to dismiss, the counsel for appellee has not sought what he himself considers substantial grounds. His only attempt has been to obtain grounds sufficient to give color for such a motion, in order that he may thereby be able to claim that this Court should consider his motion to affirm. In other words, as we have already said, the motion to dismiss is a mere peg upon which to hang the motion to affirm.

Motion to Affirm.

THM MOTION TO AFFIRM SHOULD BE DENIED.

I.

We claim that there is no sufficient color or reason for a motion to dismiss in these cases, and that, therefore, the motion to affirm should not be considered by this Court.

Gay agst. Parpart, 101 U. S., 391.
School Dist. of Ackley agst. Hall, 106 U. S., 428.
New Orleans agst. Louisiana Construction Co., 129 U. S., 45.

II.

Davis is not estopped to claim that the California judgment of November 18, 1873, is void for want of jurisdiction in the Court granting it.

FACTS.

In August and September, 1869, Davis made and delivered certain promissory notes to one H. P. Wakelee (Record, Amended Bill of Complaint, fols. 42–44).

Subsequently and on September 11, 1869, Davis filed his petition in the United States District Court for the District of California, to be adjudged a voluntary bankrupt. On September 30, 1869, he was so adjudged.

Subsequently, H. P. Wakelee proved in said bankruptcy proceedings the debts evidenced by said promissory notes.

Afterwards, and in June, 1873, said H. P. Wakelee petitioned said Bankruptcy Court for leave to sue Davis, and, by order of said Court dated July 8, 1873, he was given leave to bring an action or actions upon said promissory notes against Davis (Record, fol. 67).

Accordingly, in July, 1873, said H. P. Wakelee began suit upon said promissory notes against Davis in the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco. Davis was then a non-resident of California. The summons was served upon Davis by publication, as was then permitted by the Code of California.

On November 18, 1873, without personal service of summons upon Davis, and without his appearance in person or by attorney, and without his answering or demurring, and without any proceedings by attachment or *in rem*, H. P. Wakelee in said suit entered judgment against Davis for $22,809.26, with interest at seven per cent. from date till paid.

This judgment, when obtained, was considered valid and enforceable in the State of California.

See *Hahn agst. Kelly*, 34 Cal., 391 (1868).

To-day, under the decision of *Pennoyer agst. Neff*, 95 U. S., 714 (1877), it would be held to be a void judgment—void as a judgment *in personam* and void as a judgment *in rem*.

And *Pennoyer agst. Neff* is now followed in California.

See *Belcher agst. Chambers*, 53 Cal., 635 (1879).

It is to be noticed, however, that the decision in *Pennoyer agst. Neff*, *supra*, was not until October, 1877. This date is important, and should, therefore, be borne in mind.

After said judgment was obtained, and on December 23, 1875, Davis filed in said bankruptcy proceedings a petition for his discharge. Subsequently, and on February 23, 1873, H. P. Wakelee filed in said proceedings specifications of opposition to said discharge (Record, fols. 68–71).

Still later, and on March 18, 1876, Davis filed a petition in the Bankruptcy Court and gave notice of motion for an order canceling the proof of debt theretofore made by Wakelee against the estate of Davis, and to dismiss and disregard the specifications of opposition filed by said H. P. Wakelee to Davis' discharge in bankruptcy.

This petition is found at fols. 72–74 of the Record, and said notice of motion at fols. 71–72. This case concenters itself about that petition and its surroundings, and we therefore state it in detail.

The grounds stated in the petition for an order canceling the proof of debt made by H. P. Wakelee against the estate of Davis, and dismissing and disregarding the specifications of opposition, are these: that H. P. Wakelee, on or about June 28, 1873, and after he had proved up his debt or claim against the estate of Davis, petitioned the Bankruptcy Court, and on or about July 8, 1873, obtained from said Court an order granting leave to him to commence any action or actions at law or suits in equity against Davis, as he might be advised, in any State or country having jurisdiction of the person or property of said Davis; that thereafter and about July 19, 1873, said H. P. Wakelee began an action in the Fifteenth Judicial District Court in and for the City and County of San Francisco against the said Erwin Davis for the same cause of action on which he had proved up his debt in the said bankruptcy proceedings, and in the due course of the said action the said H. P. Wakelee obtained a judgment of the said Fifteenth District Court in his favor and against the said Davis; "that said judgment still stands of record in the said Fif-

teenth District and is in full force" (Record, fols. 72–74).

This motion came on for argument in July, 1876, and was thoroughly argued by counsel for both sides.

At the time of said motion, counsel seem to have stipulated certain facts to be correct and true (Record, fols. 135–137).

In addition to the facts we have already set forth, it was stipulated that after H. P. Wakelee obtained said judgment in California on November 18, 1873, he brought suit on said judgment in France, and in said action in France caused property to be attached; that this action had been removed to England by consent of parties and was still pending; that the action was begun in France before Davis filed his petition for a discharge; that H. P. Wakelee filed opposition to the petition for discharge without cancellation of his judgment or dismissal of his action in France (Record, fol. 136).

This motion to cancel H. P. Wakelee's proof of debt and dismiss his specifications of opposition was argued before Judge Hoffman, and he took a memorandum of authorities cited by respective counsel, which appears in evidence (against the objection of appellant) at fols. 169–171.

The complainant, in taking proofs, secured (against the objection of appellant) a statement of the recollection of counsel who acted on the argument of this motion for H. P. Wakelee, as to what question or questions were argued by counsel respectively. Counsel for Davis was also examined on the same point. We claim that all this evidence as to what was orally argued, is incompetent and irrelevant to show what was decided; but, waiving this for the moment, it appears that counsel for Davis took the following on the oral argument of said motion; that Wakelee having

proved his debt in bankruptcy, and subsequently having gone into a State court and obtained a judgment, was not entitled to be heard in opposition to the bankrupt's discharge, unless he filed a stipulation to discharge his judgment in case the bankrupt obtained his discharge in the Bankruptcy Court. In other words, Wakelee was obliged to choose between remaining in the Bankruptcy Court and depending upon defeating a discharge or getting out of said Court and taking his chances in the State Court under his judgment (Thompson's testy., Record, fols. 174–175; see also testy. of Naphtaly, fols. 126–127).

The motion seems to have been taken under advisement by the Court. On October 31, 1876, an order was entered canceling Wakelee's proof of debt and dismissing and disregarding his specifications of opposition (fol. 75).

No opinion was delivered by Judge Hoffman in deciding the motion. It will be seen that the order itself recites no ground upon which it is made.

After the entry of said order said Wakelee made no further objection to a discharge, and such discharge was granted to Davis.

The point made by counsel for appellee upon these facts is that Davis is estopped by said order of October 31, 1876, *from denying that the California judgment of November* 18, 1873, *is valid.*

His contention, if we understand it correctly, is that this order of October 31, 1876, was in reality *not* an *order;* it was actually a *final decree*, and binding as as an adjudication (Counsel's Brief, *passim*, but particularly pp. 37 and 38).

His contention, in a word, is that this order of October 31, 1876, is a *final adjudication* between H. P. Wakelee and his assigns (including complainant) and Davis, to the effect that the California judgment of November 18, 1873, is a *valid* judgment.

The estoppel thus invoked is, of course, an *estoppel by record.* The doctrine resorted to is that of *res adjudicata.*

We should have had no doubt about counsel's position were it not that starting with the doctrine of *res adjudicata,* that is, of estoppel by record, in a moment's time he confuses estoppel by record with estoppel *in pais,* or by conduct. This confusion is shown by his reliance upon the case of *Phila., Wash. & Balt. R. R. Co. agst. Howard,* 13 How., 307, which is a leading authority on *estoppel in pais,* but which has *nothing* to do with the doctrine of *res adjudicata* or *estoppel by record.* (Brief, pp. 28-31).

Compelled by this doubt as to counsel's position, we shall attempt to show that there is no estoppel, *either of record or in pais.*

A.

No estoppel of record.

(*a.*) The order of October 31, 1876, is not a final adjudication at all, and cannot operate to estop any party thereto.

That order was simply the determination of an interlocutory motion, and surely it needs not the citation of authorities to this tribunal for a proposition so fundamental as that an order on a mere interlocutory motion is not such an adjudication as to estop the parties thereto in a subsequent action.

Counsel does not dispute this position. He contends that the so-called order is no "order" at all, but is a "decree," or, what is more, a "final decree."

This proposition we dispute.

See the exact position of the parties at the time this motion was made and the exact thing Davis sought and accomplished by the motion which resulted in the order of October 31, 1876!

Davis, on September 30, 1869, had been adjudi-

cated a bankrupt. On December 23, 1875, he applied to the Bankruptcy Court by petition for a discharge from his debts. On February 23, 1876, H. P. Wakelee, acting presumably under Section 5111 of the U. S. Revised Statutes, filed in said Court in said bankruptcy proceedings specifications of opposition to such a discharge.

The question or questions of fact presented by those specifications the Bankruptcy Court might have ordered tried at a stated session of the District Court (R. S. of U. S., Sec. 5111).

At this point, however, Davis took the position that H. P. Wakelee had no standing or right to oppose his discharge, and accordingly, through his attorney, he presented to the Bankruptcy Court the petition of March 18, 1876, with the notice of motion to cancel Wakelee's proof of debt and to dismiss and disregard his specifications of opposition.

This motion resulted in said order of October 31, 1876. The fact that Wakelee did not appeal from this order cannot affect the order as an adjudication. If it was not such a final adjudication as could operate by way of estoppel, the failure of Wakelee to appeal from it could give to it no effect it otherwise would not have had.

To our mind, the position may be illustrated as follows:

A sues B. B answers. A makes a motion to strike out the answer. An order is entered striking out the answer. Would any one contend that this order can estop any party to it in future litigation as to any fact, and would it give any additional force to the order as an adjudication if the order should employ language apt only for a decree or judgment, as, for example, in the order under review, "It is ordered, *adjudged* and *decreed*"? Certainly not.

That was the precise position of Davis here. His petition for a discharge corresponded to a complaint

or declaration at common law. The specifications of opposition corresponded to an answer to said complaint. The plaintiff Davis made a motion to strike out the answer or specifications and succeeded.

An order of this kind, however serious it may be in its results to the parties if carried into operation, cannot constitute an estoppel any more than a verdict without a judgment entered thereon.

Such an order has nothing final about it and might at any time before the final discharge was granted to Davis, have been set aside or modified, on the same or on further and other facts. It was like a verdict, which can always be set aside till judgment is entered, and when judgment is entered, it is not the verdict, it is the judgment itself that operates to estop.

That a verdict without a judgment is of no validity, either as estoppel or as evidence,

See

Reed agst. The Directors of Locks and Canals, 8 How., 274, at p. 291, where Judge Grier says: "There was no judgment of the Court upon the verdict, which alone could give it the force or effect of *res judicata.*"

Smith agst. McCool, 16 Wall., 560, at p. 561, where Judge Swayne says: "A verdict without a judgment is of no validity either as an estoppel or as evidence."

See further—

Lorillard vs. *Clyde et al.*, 99 N. Y., 196, at p. 200, where Miller, *J.*, says: "The adjudication is not in the verdict but in the judgment adopted by the Court."

Hawks agst. Truesdell, 99 Mass., 557.
Bigelow on Estoppel (5th Ed.), p. 51.
Black on Judgments, Vol. II., Sec. 682.

So here this order of October 31, 1876, was *not*

final. It struck out Wakelee's specifications of opposition to a discharge. That is true. But it was entirely in the power of the Bankruptcy Court at any time down to the very granting of the discharge, to modify or even reverse said order upon the same or upon new and other facts.

As to the effect of interlocutory orders and the reasons why they do not operate as *res adjudicata*, See

Webb agst. Buckelew et al., 82 N. Y., 555, where Finch, *J.*, intelligently discusses the question in terms strikingly applicable to this case.

The position of appellee seems to be this: when Davis applied for his discharge and Wakelee filed his specifications against said discharge the California judgment of November 18, 1873, was in existence in favor of Wakelee and against Davis.

Davis had alternative positions presented to him: (1) he could go to trial on the truth of the specifications; (2) he could take the position he did, and, making use of the existence of said judgment of November 18, 1873, secure the dismissal of Wakelee's specifications.

He chose the latter position and made a motion to cancel Wakelee's proof of debt and to dismiss his specifications of opposition.

In his petition, which formed the basis of said motion, Davis alleged that said judgment of November 18, 1873, still stood of record and was in full force (fol. 73).

This fact, namely, the validity of said judgment of November 18, 1873, was one of the facts involved in and determined by said order of October 31, 1876. Davis got the benefit of this fact so adjudicated, for he secured his discharge, and Wakelee lost the opportunity of opposition and of defeating Davis' discharge. Now, says the appellee, Davis cannot turn round and claim said judgment was not valid. Its validity was determined by the order of October

31, 1876. That order is an order only in name. In reality it is a *final decree*, and therefore operates to estop Davis from claiming that said judgment of November 18, 1873, was entered without jurisdiction, even though it be admitted it was so entered.

We do not believe in the soundness of this position. We do not believe this Court will admit its soundness. Of course, if it be sound, then the operation of said order as *res adjudicata* must be *mutual*. It cannot operate to estop Davis and fail to operate to estop complainant, Wakelee.

Test the soundness of this position.

Suppose complainant, taking the view her counsel of to-day did take in 1882 (Brief, p. 15), namely, that the judgment of November 18, 1873, being void, could form no defense to an action upon the promissory notes, which formed the basis of said judgment, should sue Davis in some State where the Statute of Limitations against said notes had not run. Suppose, further, that Davis should set up as a defense to said notes said California judgment. Complainant replies that said judgment is void, and therefore does not merge the original notes and constitutes no defense to the action thereon.

Would any lawyer or any court, in its senses, say to complainant, " No; you cannot now take the position that said California judgment is void; some years since, in the Bankruptcy Court in the District of California, by an order entered October 31, 1876, it was *decided* that that judgment was valid. That order was never appealed from and became final. Although an order, so called, it was in reality a final decree, and as such is *res adjudicata* of the validity of said judgment of November 13, 1873."

It impresses us that such reasoning would be absurd; and yet, if counsel is correct in arguing that the order of October 31, 1876, is a final decree, and as such final decree involved and determined the question of the validity of said judgment of Novem-

ber 18, 1873, it inevitably follows that the complainant would be estopped, in an action on the promissory notes, from claiming that a defense setting up said judgment was invalid.

(*b.*) So far, we have argued simply as to the *nature* of said order of October 31, 1876. *Appellee* claims that it is in its nature a *final decree*, and that the doctrine of *res adjudicata*, that is, of *estoppel by record*, applies to it. *Appellant* claims that said order is nothing but an interlocutory order, *res adjudicata* of nothing, and therefore cannot operate as an estoppel by record.

We shall now *assume*, for the sake of argument, that said order of October 31, 1876, is all that the appellee claims it to be, and that it is *res adjudicata* of whatever it decided and determined. Still, we claim that it is *not res adjudicata* of the *validity* of the California judgment of November 18, 1873.

In the first place, how is it to be determined what it is that was *adjudicated* by the order of October 31, 1876?

There is no opinion of the Court to give a clue to the ground or grounds upon which Judge Hoffman acted in making said order. The order itself recites no ground upon which it was made.

Of course, we are not only entitled to look at the order itself, but we can also look at the petition on which the motion was based, and at the agreed statement of facts.

Suppose we confine our attention to these papers alone; what question was determined by said order of October 31, 1876?

It seems to us clear that all we can say with any certainty is that the question before the Court on that motion was *simply and solely* whether Wakelee had any standing or right to oppose the discharge of Davis. Davis argued he had not, and Wakelee argued he had. The Court, in its decision embodied

in the order of October 31, 1876, decided and determined that Wakelee had no right or standing to oppose the discharge.

Now, when we come to look further and ask ourselves upon what grounds and for what reasons the Court *held* that Wakelee had no standing and no right to oppose the discharge, it seems impossible, from the order, petition and agreed statement of facts, to say with any certainty upon what ground the Court did so decide.

There are, it strikes us, three different and possible grounds upon which such a decision could have been rendered:

(1.) Wakelee, having proved his debt in bankruptcy against the estate of Davis, had thus stayed himself from pursuing any remedy against Davis except in the Bankruptcy Court. Subsequently, however, Wakelee had applied to the Bankruptcy Court to vacate that stay and to permit him to sue Davis, and the Court granted him "leave to commence any action or actions at law or suits in equity against Davis in any court or courts in any State or country having jurisdiction of the person or property of said Davis" (Record, fol 67). The consequence of this was to dismiss the bankruptcy proceedings as to this creditor, and any discharge subsequently obtained could have no effect to discharge the debt of Wakelee, and so he had no interest, and therefore no standing to oppose a discharge.

We do not know how plausibly this may strike the Court; but we do know that this was the actual view taken as to the effect of a precisely similar order granted by the same Court to another creditor of this same Davis, namely, to McDonald, by the Supreme Court of the State of New York in the case of *McDonald* agst. *Davis*, 26 Hun, 53, where Davis, *J.*, says: "It was equivalent to a dismissal of the proceedings in bankruptcy *pro tanto*, and in

so far as they affected the appellant's demand proved in bankruptcy and which might be recovered in the pending suit."

This decision was reversed in 105 N. Y., 508.

(2.) The Court might have reasoned in this way: Wakelee had choice of two remedies or sets of remedies — one in the Bankruptcy Court and one outside of and independent of that Court. At first he proved his debt in the bankruptcy proceedings. This fact stayed all other proceedings to collect his claim, and confined him to the Bankruptcy Court for a remedy. Subsequently, however, on his application the Bankruptcy Court vacated the stay, which resulted from said proof of his debt in bankruptcy, and allowed him to resort to remedies outside of the Bankruptcy Court. He resorted to an action in a State court of California, and obtained judgment therein; subsequently he sued on said judgment in France and attached property of Davis, and this litigation was thereafter removed by consent to England, and was being pressed at the time of this motion to cancel Wakelee's proof of debt and dismiss his specifications.

Davis filed his petition for a discharge. Wakelee was then called upon to decide which set of remedies he would continue to pursue. Having proved his debt, and that proof being still unexpunged, he could still resort to the Bankruptcy Court, but only on the condition that he should yield the remedies in other courts, provided Davis should get a discharge. This Wakelee was unwilling to do. His choice lay between remedies in the Bankruptcy Court and remedies out of that Court; and his decision being to rely on his remedies outside of the Bankruptcy Court, all that was then left to that Court was to deny him any standing or right to remain therein and to oppose the discharge. Hence the order of October 31, 1876.

(3.) Still a third position remained, similar to, but not identical with, the second position. Wakelee, after the adjudication of Davis as a bankrupt and his own proof of debt in the bankruptcy proceedings, secured leave to sue Davis on the promissory notes, did sue him, and obtained judgment November 18, 1873. This judgment merged the original promissory notes and formed a new debt, which did not exist at the time of the adjudication, and was therefore not provable in bankruptcy; and as only debts provable in bankruptcy could be affected by a discharge, this judgment could not be discharged, and therefore its owner, Wakelee, had no interest, and therefore no right to oppose the discharge. Hence the order of October 31, 1876.

The appellee herein agrees with us that the order of October 31, 1876, the petition, and the agreed statement of facts, taken together, do not indicate the ground or grounds upon which the order of October 31, 1876, was granted, and that therefore it is impossible to infer from them, without the aid of extrinsic evidence, what it was that was determined and decided by that order; in other words, what it is that that order is *res adjudicata* of, that is, as to what it acts as an estoppel (Brief, pp. 24, *et seq.*).

So far, appellee and appellant agree. Furthermore, there is no disagreement between them as to the general principle that when the record does not disclose on what ground or what ground of many grounds the decision rests, a resort to extrinsic and parol evidence is permissible.

But at this point they part company. They differ as to the *nature* of the extrinsic and parol evidence that is competent and admissible to prove the ground upon which the Court proceeded in making the order of October 31, 1876.

The appellee claims that a resort can be had to the oral arguments of counsel who argued in support of and against said motion which resulted in said order

of October 31, 1876. Accordingly, in taking the testimony, counsel who had argued for Wakelee against said motion were examined and asked to state and did state to the best of their recollection the arguments which were urged by Davis' attorneys, in support of said motion (See testy. of Barnes, fols. 115–117; testy. of Naphtaly, fols. 125–128).

This testimony was objected to by appellant and motions made to strike it out. We claim that the arguments of counsel are incompetent as evidence to show what it was that was determined by the Court in the order of October, 31, 1876. As well might the Court resort to the summing up of counsel to the jury in a jury case as evidence of the questions decided by the jury.

This precise point was decided in the case of *Greenlee agst. Lowing & ors.*, 35 Mich., 63.

That action was brought to recover upon a replevin bond. There had been a former action between the same parties upon the same bond, and a judgment for the defendant. After the files and judgment in the former case had been admitted in evidence, plaintiff's counsel offered in evidence the brief of defendant's counsel upon the former trial to show that the only point contested in that case was the sufficiency of the return of the execution to prove a breach of the condition of the bond for the purpose of showing that the judgment in that case was not upon the merits, and therefore not a bar to the present action. The evidence was rejected and an exception taken.

The Court said (per Marston, *J.*), at p. 66: "We discover no error in the rejection of the brief. *Briefs of counsel are not an unerring indication of the basis upon which a judgment has been rendered. They sometimes omit to discuss questions considered by the Court, and frequently discuss those not involved in the case. We are of opinion that for the purpose offered the brief was not admissible.*"

For a like reason the testimony of jurors as to the particular ground upon which they found a verdict is not admissible to prove what is determined by their verdict.

In *Packet Co. agst. Sickles*, 5 Wall., 580, at p. 593, Judge Nelson says: "Some of the jurors in the former trial were permitted to testify as to the particular ground upon which they found the verdict. Their testimony was not objected to, and therefore is not available as error here; but it is proper to say, that the secret deliberations of the jury or grounds of their proceedings while engaged in making up their verdict are not competent or admissible evidence of the issues or findings. The jurors oftentimes though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it."

If we are right in our position that this evidence was inadmissible and should be disregarded by this Court upon this appeal, then it seems to follow that there is no evidence sufficient before us from which to infer the ground upon which the order of October 31, 1876, *was decided, and therefore there is no evidence from which it can be said that that order determined the validity of the judgment of November* 18, 1873.

(c.) But we go still further and claim that even if the evidence was admissible and is to be considered by the Court, still the order of October 31, 1876, is *not res adjudicata* of the *validity* of the judgment of November 18, 1873.

Appellee's position is this: Davis *asserted* and the Court *decided* that the judgment of November 18, 1873, *merged* the original promissory notes and constituted a new debt not provable in bankruptcy, and therefore one which would not be affected by any discharge and whose owner consequently had no interest, and therefore no right

to oppose the discharge. *Only a valid judgment could operate to merge said promissory notes;* but *as* the Court decided that the judgment of November, 18, 1873, *did merge* said promissory notes, *therefore it must have decided that said judgment of November* 18, 1873, *was valid*, and *therefore* the order of October 31, 1876, is *res adjudicata* of the *validity* of said judgment of November 18, 1873, and *estops* Davis *from now claiming* it to be *invalid.*

We admit that only a valid judgment could merge said promissory notes. But we do not by any means admit that because the Court decided that said judgment of November 18, 1873, *merged the original promissory notes, it therefore decided that said judgment of November* 18, 1873, *was a valid judgment.*

The *validity* of said judgment was *assumed* on the motion which resulted in said order of October 31, 1876. *It was not a fact in dispute or drawn in question, and was therefore not litigated. The only question litigated was the effect of the admitted facts.* Those facts were admitted for the sake of that particular motion only, and *not* for all motions or all possible future litigation, and the parties to that motion are now entirely at liberty to dispute the truth of said facts in this new and different litigation.

Because the Court, acting on the fact which was admitted to be true for that motion—namely, that the judgment of November 18, 1873, was valid—decided that said judgments merged the original promissory notes—it by no means follows that neither Davis nor Wakelee can now dispute the truth of that fact then admitted.

This very question, as it seems to us, has been set at rest by authorities of great weight and cogency.

In *Mason's Executors agst. Alston*, 9 N. Y., 28, the action was brought by the executors of the will of John Mason against one of the daughters of their testator and her husband. John Mason died Sep-

tember 26, 1839, and his will was admitted to probate and letters testamentary issued to the plaintiffs in the action as sole executors October 25, 1839. October 20, 1840, Mrs. Alston and her husband filed before the Surrogate allegations contesting the probate. Proofs being taken under these allegations the probate was confirmed by the Surrogate, whose decision was affirmed on appeal to the Circuit Judge in November, 1844. The Supreme Court, on further appeal, reversed the former decisions, and awarded an issue to try the question of the due execution of the will. It was the trial of this issue which was sought to be enjoined in the present action; and a perpetual injunction was awarded at Special Term, but the General Term, on appeal, dismissed the complaint.

The grounds on which the injunction was asked were as follows:

March 26, 1840, James Mason, a son of the testator, filed his bill in Chancery against the present plaintiffs and all persons interested in the estate of John Mason, including Mr. and Mrs. Alston. *The bill set forth the due execution of the will* and claimed a distribution of the estate as in case of intestacy, on the ground that the trusts declared therein were repugnant to the statutes, and therefore void. March 30, 1841, Mr. and Mrs. Alston filed their separate answer, which contained the following clause: "And these defendants, further answering, admit that the devise of real and personal estate contained in the said instrument purporting to be the last will and testament of the said John Mason, if said instrument were duly executed and published as such, is nevertheless, as these defendants are advised and believe, utterly null and void and have no legal effect."

Upon the hearing of that clause in May, 1845, there being some infant defendants, the probate of

the will was put in evidence, but the will itself was not proved. The assistant Vice-Chancellor decreed that the bill be dismissed on the ground that the trusts of the will were "not repugnant to the provisions of the Revised Statutes or laws of this State."

It was claimed in the present action that the defendants were concluded by this degree from contesting the due execution of the will; and the complaint prayed that the trial of the issue might be enjoined.

The Court of Appeals affirmed the judgment below dismissing the complaint.

Willard, *J.*, delivering the opinion of the Court, says: "The object of the bill filed by James Mason against the executors of his father's will and others interested in that estate was to have the provisions of the will declared inoperative and void as contrary to the statute, and the estate distributed in the same manner as if the testator had died inestate. *All the parties engaged in that litigation took for granted the valid execution of the will. The whole matter in controversy, which was passed upon and tried in the courts, was whether the provisions in the will were in conflict with the Revised Statutes.*

"The decision of that question did *not* prevent any of the next of kin, although parties to that suit, from contesting the validity of the will by a direct proceeding before the Surrogate in the manner pointed out by the statute. In that proceeding the only inquiry is whether the instrument in question is the last will and testament of the supposed testator. This goes to the *factum*, the legal execution of the will only. *The other action made no issue upon this point, and its admission of the execution of the will is merely argumentative.* It was not put in issue by the cause, nor could it have been made a material issue in that action. One of the principles in relation to an estoppel is that it must be certain to

every intent and *not be taken by argument or inference*" (Co. Litt., 352 *b*).

This decision is specially applicable to the present case.

In the case quoted the argument was as follows: Only a valid will can contain valid trusts. Now, the Court decided that the trusts in Mason's will were valid, and *therefore* it must be decided that the will itself was valid. There is no disputing the first premise; but it does not follow that because a court decides that the trusts of a will are valid, it therefore necessarily decides that the will itself is valid. That fact may be admitted and in the case quoted was admitted. In that event the only question decided is not the admitted fact, but the effect of the fact so admitted.

The present case is almost identical with the case quoted. Here the Court decided, according to appellee, that the judgment of November 18, 1873, merged the original promissary notes and destroyed them as an existing claim. This was true only in case the judgment of November 18, 1873, was valid; but it does *not*, therefore, follow that the Court *decided* that said judgment was valid. That fact was not drawn in question; it was not in issue. It was assumed; and the only question before the Court, and therefore the only question determined by the Court was the effect of that admitted fact. The admitted fact may now be denied and proved to be not as then admitted.

The position of Davis in the Bankruptcy Court was almost precisely the same as that of Mason's executors in the case quoted. It can make no difference that Davis resorted to a motion in the Bankruptcy Court, instead of resorting to a separate action in equity. It is perfectly possible that Davis, instead of moving to strike out Wakelee's specifications of opposition, could have brought an equity action to restrain him from filing the same, or, after

filing them, from insisting upon or proving them. If he had begun such an action, based upon the facts stated in the petition of March 18, 1876, and the fact of the validity of the judgment of November 18, 1873, had been admitted in said action, as it was on said motion, the question involved would be identical with the question in the case quoted, and it would be absurd to argue that at this day Davis could not dispute the truth of the fact so asserted, namely, the validity of the judgment.

The fact that Davis resorted to a motion in the Bankruptcy Court, instead of to an independent action, cannot affect the question of *res adjudicta* or the effect of the order of October 31, 1876, as an estoppel.

A very similar question arose in the case of *Boyd* against *Alabama*, 94 U. S., 645. Error to the Supreme Court of Alabama.

Prior to the year 1868 there was a statute in Alabama prohibiting lotteries and imposing a fine upon any person setting up or carrying on a lottery without legislative authority. On October 10, 1868, the Legislature of Alabama passed a certain act, which allowed the carrying on of certain lotteries. This last act was repealed in March, 1871. Defendant was indicted for setting up and carrying on a lottery without legislative authority, and was convicted and sentenced to pay a fine of $1,000. The Supreme Court of Alabama affirmed this judgment. At the trial, the defendant admitted that he had been engaged in the setting up and carrying on of a lottery in Mobile, Alabama, within twelve months before the finding of the indictment. He claimed a license for that purpose under the Statute of 1868, he being one of the persons named therein; and the State admitted that the defendant had paid the money required by the Statute of 1868 into the treasury in November of the preceding year, and that the acts with which he was charged were done under that

statute and would be legal if the statute were constitutional and it were not subsequently repealed.

In a former case by the State of Alabama against the same defendant, upon an indictment of a similar kind for a previous offense of setting up and carrying on a lottery, the Supreme Court of the State of Alabama had held that the statute in question constituted a contract, and that the repealing act was for that reason void. The defendant, therefore, contended that the question of the constitutionality of the Statute of 1868 was *res adjudicata*, and that the State of Alabama could not, on the trial of the present indictment, dispute the constitutionality of that act.

Judge Field, in delivering the opinion of the United States Supreme Court, says: "The questions thus presented for our consideration relate to the constitutionality of the Act of 1868, and the effect upon the right or privilege there conferred of the repealing Act of 1871. The defendant contends that the right or privilege to set up and carry on lotteries in the State, conferred by the act, rests on a contract, a consideration being given for its grant by the prescribed yearly payment into the treasury, and that the repealing act cannot, therefore, impair it. *In consequence of a previous adjudication of the Supreme Court of the State, construing the act as constituting a contract on the principles therein named, the defendant there contends that the State is estopped from denying its constitutionality.*

"It is true, that in a former case against the same defendant upon an indictment of a similar kind for a previous offense of setting up and carrying on a lottery, the Supreme Court of the State held that the statute in question constituted a contract, and that the repealing act was for that reason void; *but in that case the only subject before the Court was the meaning of the statute—whether its provisions in their terms amounted*

to a contract which a subsequent enactment would not impair. The constitutionality of the act was not drawn in question; that was not denied."

The Court held that the State was not estopped, and affirmed the conviction.

It is apparent that in the case quoted, on the trial of the first indictment, the defendant claimed that the right or privilege conferred by the Act of 1868 rested on a contract, a consideration being given for its grant by the prescribed yearly payment into the treasury, and that the repealing Act of 1871 could not impair it. The constitutionality of the Act of 1868 was asserted by the defendant and admitted by the State of Alabama; and the only question then determined by the Court was as to the effect of the Act of 1868, assuming it to be valid.

In the present case, Davis asserted the validity of the judgment of November 18, 1872. The truth of that assertion was admitted. The only question, therefore, before the Court on the motion was the effect of the admitted fact. The fact itself was not drawn in question or determined. The effect of the admitted fact was drawn in question and determined.

(*d.*) The Constitution of the United States provides in Article IV., Section 1, that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

Suppose A had sued B upon a promissory note in California in 1875, prior to the decision of this Court in *Pennoyer* v. *Neff*. B was in 1875 and ever since has been a non-resident of, and not domiciled in, California; no personal service of summons upon B was ever had, he never appeared in person or by attorney, no attachment or process *in rem* was ever issued or levied in the action. Suppose that under the law then existing in California the summons

was served upon B by publication and judgment was finally entered in favor of A and against B.

This judgment, it is agreed, is void under the decision in *Pennoyer* v. *Neff*, 95 U. S., 714, both in and out of California.

Now suppose further that in 1885 A sued B upon said California judgment in the State of Pennsylvania, and that B appeared and set up the want of jurisdiction in the California court to grant said judgment, and that, therefore, it was void. The Pennsylvania court, however, erroneously decided that the California judgment was not void, but was valid and gave judgment against B, from which judgment B has never appealed, and which judgment is entirely unsatisfied and still of record.

Now suppose further that to-day A catches B, who has since 1885 become rich, in the State of New York, and sues him upon said California judgment in New York. B sets up the want of jurisdiction in the California court to grant said judgment, and claims it to be void. A, however, replies that in 1885 he sued B upon the same judgment in Pennsylvania, that B in that suit set up the same defense, and that the Pennsylvania court decided against B and entered judgment against B, and that said Pennsylvania judgment is still unreversed and in full force and estops B from claiming the California judgment to be invalid.

Would the New York court hold B estopped by the Pennsylvania judgment and refuse to decide for itself the validity or invalidity of the California judgment?

To our minds the statement of such a proposition is its own best refutation. We do not know of any decision upon the point. In the limited time at our command we have not exhausted the authorities. But it certainly would lead to a startling result; for it would, through the doctrine of estop-

pel, enable any one State in this Union to determine for every other State by an erroneons decision the validity or invalidity of a judgment of any given State, and practically nullify the provision of the Constitution.

We do not believe that this doctrine of estoppel can be carried to any such extent. Each State is made the judge for itself as to the validity of the judgments of other States, unhampered by any doctrine of *res adjudicata* or estoppel by prior adjudication of other States.

The case supposed is precisely the case at bar, if we *assume* with appellee that the order of October 31, 1876, adjudicated that the judgment of November 18, 1873, was valid.

On that assumption in 1876 the U. S. District Court in bankruptcy decided that the judgment of November 18, 1873, given by the California court against Davis was valid. The decision of that fact was erroneous. That is admitted by counsel.

Now H. P. Wakelee's successor in title to the California judgment sues Davis in the State of New York in the United States Circuit Court, Southern District of New York, and claims that by reason of the erroneous decision of the United States District Court for the District of California in 1876 Davis is estopped to assert in the action in New York the invalidity of the California judgment.

In other words, the United States Circuit Court in New York is denied the privilege of deciding for itself what faith and credit should be given to the California judgment, because, forsooth, Davis is estopped to raise the question by an erroneous decision of the United States District Court in California.

This may be law, but we doubt it.

B.

No Estoppel in Pais.

There can be no estoppel *in pais*, unless there is a representation by one party to another, made either in words or by conduct, intended to be relied upon and actually relied upon, to the detriment or loss of the other party.

Generally, the representation must be one of *fact* and not of *law*.

But we are not going to argue here the nature of the representations made by Davis through his attorneys on the argument or the written representations made in the petition and agreed statement of facts. We are sure that no representation, whether of fact or of law, made by Davis or his attorneys, was ever relied upon by Wakelee or his attorneys, to the detriment or loss of Wakelee.

In the amended bill of complaint, it was alleged that Wakelee was induced to accept and did accept said order of October 31, 1876, and did not appeal therefrom, by reason of his reliance upon certain admissions, declarations, assurances, allegations and representations of Davis. The proof, however, at the trial, distinctly showed that, in accepting said order and not appealing therefrom, no reliance whatever was ever placed upon any representations, whether oral or written, made by Davis or his attorneys (see testy. of Barnes, fols. 117–119; testy. of Naphtaly, fols. 128–129; 130–131).

At this point it cannot be amiss to examine the *parallel* instituted by counsel for appellee between this case and the well known case of *Phila., Wash. & Balt. R. R. Co. agst. Howard*, 13 How., 307.

This parallel plays a pretty important role in counsel's brief, occupying parts of pp. 28 and 31 and all of pp. 29 and 30.

That case is a leading case in the doctrine of estoppel *in pais*. It was an action of covenant brought by Howard against the Phila., Wash. & Balt. R. R. Co. The plea was *non est factum*.

The defendant railroad was the successor of the Wilmington & Susquehanna R. R. Co. On July 12, 1836, a contract was entered into between that company and Howard for the prosecution of the work in Cecil County, Md. Two copies of this paper were extant. They were substantially alike except in this: that one of them was sealed by Sebre Howard and was signed by James Canby, President, with his private seal affixed. It was not sealed by the railroad company. The other was signed and sealed by Howard and signed also by Canby as President. It also bore an impression which purported to be the seal of the company.

This latter paper was the basis of the present suit. Howard was proceeding in the construction of the road, when the company declared the contract forfeited.

An action of assumpsit was then brought by Howard against the Wilmington & Susquehanna R. R. Co. in Cecil County Court, Md. In said case the plaintiff, Howard, relied upon the first contract mentioned above, which did not purport to be sealed by the railroad company. There was evidence in this case tending to show that at the trial of said action of assumpsit one of the defendant's counsel in that action had in his possession the second contract above mentioned (which purported to be sealed by the railroad company) and handed said paper to the Judge as the real contract in the case, and spoke of it as the real and genuine contract between the parties; that said contract was offered in evidence by defendant as the deed of said company, and that evidence of the fact that it was such deed was offered by said defendant; and plaintiff's attorney, satisfied by the production and proof of said last contract as

the sealed deed of the defendant that said suit could not be maintained, suffered a verdict to be taken for the defendant.

This evidence was objected to and admitted under exception.

The Court below instructed the jury as follows: "If the jury find from the evidence that this instrument of writing was produced in Court and relied upon by the present defendant as a contract under the seal of the Wilmington & Susquehanna R. R. Co. in an action of assumpsit brought by Sebre and Hiram Howard against the last mentioned company in Cecil County Court, and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of said sealing, because such a defense would impute to the present defendant itself a fraud upon the administration of justice in Cecil County Court."

Curtis, *J.*, says, in discussing the exception to this instruction, at p. 336: "It is further objected that the facts supposed in the instruction do not amount in law to an estoppel. We think otherwise." [He then discusses certain authorities and proceeds as follows:] "These decisions go much further than this case requires, because the defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil County Court by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law that when a party asserts what he knows is false, or does not know to be true, to another's loss and his own gain, he is guilty of a fraud—a fraud in fact if he knows it to be false, a fraud in law, if he does not know it to be true.

"Certainly it would not mitigate the fraud if the

false assertion were made in a court of justice and a meritorious suit defeated thereby. We are clearly of opinion that the defendant cannot be allowed to say that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable to hold that the representation which defeated one action on a point of form should sustain another on a like point."

The precise question involved in the case cited is apparent. The action was covenant, the plea *non est factum*, and the plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington and Susquehanna R. R. Co., defendant's predecessor. To prove this fact, he offered evidence that the Wilmington and Susquehanna R. R. Co., through its counsel, had represented the instrument as bearing the corporate seal of that company, and that he, relying upon said representation, had suffered a verdict to be taken for the defendant in the action of assumpsit, and also had, in reliance thereon, begun the present suit.

Here, surely, was a perfect case of estoppel *in pais*. The fact whether the seal borne by the instrument in question was or was not the corporate seal depended upon the question whether said seal was or was not affixed by the authority of the railroad company. This was a *fact* resting peculiarly in the knowledge of the company and its officers, and not known to the plaintiff. The representation, therefore, that the impression of the company's seal had been made by authority of the company was a fact which plaintiff had a right to rely on and a fact not in plaintiff's knowledge. He did rely on it to his detriment; that detriment was

two-fold: (1) he was induced to suffer verdict in favor of defendant in the first suit; (2) he was induced to begin the second suit.

Here was a representation made with the intention of being relied on, known to defendant to be false, or at least not known to be true; supposed by plaintiff to be true and relied upon by plaintiff to his detriment—a perfect estoppel *in pais*.

In the present case, Davis asserted that the judgment of November 18, 1873, was a judgment "standing of record and in full force."

There is no dispute but what, in 1876, under the decision in *Hahn agst. Kelly*, 34 Cal., 391, the courts of California would have *held* said judgment a judgment "in full force," and would have enforced it by execution or otherwise.

The case of *Pennoyer agst. Neff*, 95 U. S., 714, was not decided till October, 1877, and the Calfornia courts did not reverse their views until *Belcher agst. Chambers*, 53 Cal., 635, decided in 1879.

Now, whether the representation that a given judgment is "in full force" is one of *fact* or one of *law* is of no importance to us at this time. We believe it to be a representation of *law*, such as, even though relied on to the detriment of the party to whom it is made, cannot estop. Still, we do not insist upon this point *now*.

But we do say that in this particular case the question whether the judgment of November 18, 1873, was or was not "in full force"—whether a question of *fact* or of *law*—was a question of which Wakelee knew just as much as did Davis. Wakelee obtained said judgment against Davis. He knew every step taken to obtain it, and he knew quite as well as Davis all the requisites to make a judgment "in full force."

Therefore, in representing to Wakelee that said judgment of November 18, 1873, stood of record and was in full force, Davis was not representing a fact

peculiarly in his own knowledge and presumably unknown to Wakelee.

In this respect, there is a *vital distinction* between the case of *The Phila., Wash. & Balt. R. R. Co. agst. Howard, supra*, and this case. There the representation was a representation of something peculiarly in the knowledge of the party making the representation—namely, whether the impression of the company's seal had been made with the authority of the company or not.

There is, therefore, this first and vital distinction between the cases.

There is, however, a second and even more vital distinction. In the Howard case, Howard *relied upon* the representation and *suffered detriment from such reliance*. First, he was induced to permit a verdict in the first suit in favor of defendant; second, he was induced to begin the second suit. He did each of these things *in reliance upon* the representation.

In the present case Wakelee has *done nothing in reliance upon* the representation of Davis that said judgment of November 13, 1873, was valid.

To be sure, as we have seen, complainant alleged ia her bill of complaint that H. P. Wakelee, *in reliance upon* certain claims, admissions, declarations, &c., of said Davis * * * was induced to accept and did accept the order of October 31, 1876, and did not appeal therefrom (Record, fol. 50).

But the evidence of complainant's own witnesses disproves these averments of the bill. The reason Wakelee did not appeal was because he thought Davis would be a rich man again, and he could collect his judgment (testy. of Barnes, fols. 117–119; testy. of Naphtaly, fols. 129–130).

To be sure, it may well be that detriment has resulted to Wakelee by reason of the order of October 31, 1876; but that detriment is not to be compared to the detriment suffered by Howard in his case.

The detriment suffered by Wakelee is *not* due to the *reliance upon* any representation by Davis; it is due to an *erroneous decision of the Court.* But surely, because the consequences of an *erroneous* decision have been *detrimental* to one party and *beneficial* to the other, is *no* reason for applying the doctrine of estoppel *in pais.*

Moreover, there could have been no intention on the part of Davis to mislead in representing the judgment of November 18, 1873, to be valid. Davis, in common with every one else in California, supposed at that time, in 1876, that said judgment was a valid judgment; and there is no doubt that the courts of California at that time would have enforced it as a valid judgment.

If the representation, therefore, was false, it was not known to Davis at the time to be false, nor was it a case where he represented something to be true which he did not know to be true and should have known to be true. There can, therefore, have been no intention on Davis' part to mislead, and, therefore, there was lacking an essential element of an estoppel *in pais.*

In view of the foregoing explanation, what becomes of the parallel between the Howard case and this case, a parallel upon which counsel seems to rest his case?

III.

There was a complete remedy at law. Resort to equity in aid of said contemplated action at law was not necessary.

(*a.*) We shall not concede the position taken by plaintiff in paragraph XXXIII. of the bill, namely,

that under the law of the State of New York, "in an action at law to recover the amount due upon said judgment, the facts * * * constituting the estoppels * * * may not be pleaded in plaintiff's complaint as or in aid of a cause of action, but that such action must be brought upon such judgment alone."

We claim just the reverse to be true; and in discussing this question, we shall claim that it makes no difference whether the intended action at law is brought in a State Court of New York or on the law side of the United States Circuit in New York. The form of pleading would be the same in either Court.

This is prescribed by Section 914 of the United States Revised Statutes, which provides as follows: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

Let us examine this position of the complainant.

By Sec. 481 of the Code of Civil Procedure of New York it is provided as follows: "The complaint must contain a plain and concise statement of the *facts* constituting each cause of action, without unnecessary repetition."

The one purpose above all others in the new procedure was to do away with *fictions* in pleading, and to make possible a recovery on the statement of the *actual facts*.

In the consideration of this question of pleading the estoppels in a complaint in an action at law, this Court is in the same position it would be in if

it were hearing a demurrer interposed by the defendant to a complaint so drawn.

That our position may be the better understood, we will restate it. We claim that the complainant can set out a good cause of action at law to recover the amount of the judgment of November 18, 1873, and that she can do it in the following manner. She can allege the facts as to the recovery of the judgment in California, and that by reason of a lack of personal service of Davis and want of appearance by him said judgment in and by itself is void. She can then go further and set out all of the facts which she claims estop Davis from insisting upon the invalidity of said judgment, and can allege that by reason of said facts Davis is estopped from claiming said judgment to be void, and that, therefore, in law said judgment is to be treated as a valid judgment against Davis. She can then demand judgment for the amount of said judgment with interest.

We contend that, assuming the facts alleged as such actually constitute an estoppel, such a complaint would not be demurrable, and that the plaintiff would be entitled, on proof of the allegations in such a complaint, to recover the amount of said judgment and interest.

What possible objection can there be to such a method of pleading?

The only answer vouchsafed by counsel is that he can find no authority for pleading an estoppel in a complaint in an action at law. The objection is, therefore, purely a negative one.

We have examined the authorities and find in other States where code procedure prevails and the pleader is required, as in this State, to set forth the *facts*, plain intimations that an estoppel may be pleaded in a complaint and may be one of the constituent elements in a cause of action at law.

In the State of Illinois, a Code of Procedure is in

force, and the rules as to pleading the facts are the same as in the State of New York.

In the case of *Maxwell agst. Longenecker et al.*, 89 Ill., 102, this question of pleading an estoppel in a complaint is considered. The case had been in the appellate tribunal once before, and is reported in 82 Ill., 308.

The first count of the declaration was "for preparing and making mortar and plastering certain buildings of the defendant," and "for divers materials and other necessary things by the said plaintiffs, before that time found and provided, and used and applied in and about the plastering of said buildings for the said defendant," and also for work and labor and for goods, wares and merchandise, and for money loaned, money paid, laid out and expended, and money had and received, &c. Plea, non-assumpsit. Judgment was rendered for plaintiffs.

The facts as they appeared on the trial were these: In Septembér, 1875, Longenecker & Harrison, as partners, contracted with Wagner & Weakley to do the plastering in a block of five brick buildings which they were erecting, the buildings being for different owners, one of them being for A. S. Maxwell. The work was to be done for $204.88 per building and $79 for the halls.

A. S. Maxwell, on a settlement with W. & W., was found to be indebted to them for the completion of his building $817, which, by agreement between the parties, was put in the hands of the defendant John C. Maxwell, to be by him paid out for work done for them, but the precise terms of this agreement were in dispute.

The plaintiffs claimed that soon after they commenced plastering, they learned that W. & W. were not responsible; that, in a subsequent conversation with A. S. Maxwell, he stated he would see that they got their pay for plastering his building; that,

after this, they went to A. S. Maxwell for money, when he said he could not pay any more, that he had settled up with the contractors, W. & W., but that some money had been put in defendant's hands to pay for work and materials; and that they went to defendant, who told them some money had been placed in his hands to pay out for work and materials on A. S. Maxwell's building. The judgment was reversed on the ground that the evidence was insufficient to sustain the verdict.

On a second appeal (the case is reported in 89 Ill., 102), the jury again found for Longnecker & Harrison.

The Court says: " We discover nothing in the present record in respect to the terms upon which the $817 of money belonging to W. & W. was held by appellant, materially differing from what is there (in 82 Ill., 308) disclosed. The evidence clearly shows that this money was to be paid out on the order of W. & W., and that it was so paid out. There is no pretense that appellant was indebted to appellees for work done by them for him, nor is there any pretense that any part of the money held by the appellant was set apart by agreement with W. & W. for appellees, or that they ever ordered him to pay appellees.

" *If it should be conceded that the evidence shows that appellant, notwithstanding the fact was otherwise, represented that he held the money to pay appellees, and promised to do so upon their completing the work, and that they, relying upon this represen tation and promise, did complete the work, and we should thereupon hold that appellant is estopped to deny the truth of what he represented, and must make good his promise, there still can be no recovery under this declaration, for in no count are there averments warranting the admission of such evidence.*

" *To recover on such a state of facts, if a recovery*

thereon could be had, there should have been a special count averring that."

In *Clausen agst. Jones*, 100 Ind., 123, a similar question was considered. The complaint alleged that the parties were the owners of adjoining lands; that there was a natural water-course through said lands, ending in Middle Ford Creek; that the plaintiff and defendant for fifteen years past had removed obstructions from and had deepened and straightened the channel of said water-course, and that the plaintiff had so continuously kept and maintained the same upon his land up to the present time; that he had made valuable tile drains from all directions through his land, and expended $1,000 therefor, of which defendant had full knowledge, all of which entered into said water-course, and were necessary to render his land tillable, and accomplished that purpose; that in September, 1883, the defendant unlawfully obstructed said water-course by filling it up; that said obstruction extended on the defendant's land for twenty rods from the line of the plaintiff's land towards said Middle Ford Creek, and had been continued by said defendant ever since, whereby the drainage to said water-course had been entirely destroyed, and plaintiff's tile drains rendered useless, so that sixty acres of the plaintiff's land had been useless and untillable by standing water, and the plaintiff's entire farm irreparably damaged, and a large quantity of grain in his fields destroyed. The complaint claimed $2,000 damages.

The defendant answered alleging that there were ponds on the plaintiff's land having a natural outlet through the defendant's land; that the plaintiff, by license from the defendant, cut an artificial outlet for said ponds through defendant's land, and also from time to time entered upon defendant's land

and cleared out said channel for his own benefit; that these licenses were granted without any consideration, and in 1883, were revoked by the defendant, and said artificial channel was filled up by defendant, which was the injury complained of. To this answer the plaintiff demurred, and the demurrer was overruled.

Bicknell, *C. C.*, after stating that the answer was simply an argumentative denial of the complaint, and that the demurrer was therefore bad, proceeded as follows: "The demurrer in the present case admits that there was no obstruction of a natural water-course, and that the obstruction complained of was of an artificial outlet, made by license, which license was granted without consideration, and afterwards revoked. *If there was any act done or money expended on the faith of the license the effect of which would be to prevent the revocation of such license to make an artificial outlet, it ought to be shown by some appropriate pleading.* The allegation in the complaint, in reference to a natural water-course, that the plaintiff, with the knowledge of the defendant, expended $1,000 in tile drains leading from all directions into such water-course on the plaintiff's own land, does not show that the defendant is *estopped* from revoking the parol license granted without consideration. *If the complaint had averred a license, and expenses incurred on the faith of the license, a different matter would be presented.*"

See also case of *Ransom & Co. against Stanberry, Garnishee*, 22 Ia., 324, where Cole, *J.*, intimates by his language that facts constituting an estoppel may be averred in a complaint, and, under the Code practice in Iowa, would have to be averred in order to be proved at the trial.

While it may be claimed that the cases quoted do not *decide* the question involved, the intimations therein contained are certainly very distinct and clear, and, we think, *justify us in assert-*

ing that estoppels may be pleaded as a constituent element in a cause of action at law; and we think that the authorities cited fully sustain our claim in the present case, that the complainant by setting out the facts as to the recovery of the judgment, and supplementing them by the facts constituting the estoppel, can set forth in her complaint in the intended action at law a perfectly good cause of action, and one which will entitle her to recover the entire amount of the California judgment with interest.

(*b.*) Counsel, however, now claims that the jurisdiction of a court of equity to entertain this bill turns not on the adequacy of the remedy afforded by the Code of New York, but upon the adequacy of the remedy as it would have existed under the common law system of pleading.

He cites to that effect one case, and one case alone; and that is:

McConihy agst. Wright, 121 U. S., 201.

This is a new discovery and leads counsel into the *ridiculous* position of averring in his bill, paragraph XXXIII. (Record, fol. 53), "that by the law of the said State of New York, it is necessary in an action at law upon such judgment, to allege in the complaint *either* the facts showing the jurisdiction of the Court in which the judgment was entered, *or that the judgment was duly entered*," &c., and then denying the truth of his own averment.

He now abandons this position, "because in his extremity he found it necessary to do so" (Brief, p. 48), and says that that thing can't be done (Brief, pp. 42, 43), and even if it can be done, it has nothing to do with this case (Brief, p. 48).

We shall not quarrel with counsel or with the authority cited, because we prefer to meet him on his own ground.

He says that at common law, in pleading upon a judgment, it was required to state in the declaration the jurisdictional facts (Brief, p. 40).

He seems to think that by "jurisdictional facts" is always meant "the jurisdictional facts" referred to in Section 532 of the Code of Civil Procedure of New York. In this he is mistaken. That section provides that, "In pleading a judgment or other determination of a court or officer of *special jurisdiction*, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to be *duly* given or made."

In pleading upon judgments at common law, there was always a *distinction* between judgments of courts of *general* and judgments of courts of *special* jurisdiction. In declarations upon judgments of the first class, all that was necessary was to aver that the Court had jurisdiction to grant the judgment; whereas, upon judgments of the latter class, it was necessary to aver and prove facts showing that the court granting it had jurisdiction of both person and subject matter.

Wheeler vs. *Raymond*, 8 Cowen, 311, at p. 314.

There is nothing before the Court—at least, to our knowledge—to show whether the court which granted said judgment of November 18, 1873, was a court of *general* or of *special* jurisdiction.

We do not care, however, as it can make no difference with our present argument.

We contend for this broad and sweeping proposition and its applicability to the present case—namely, that where a defendant in an action at law is estopped to deny the existence and truth of a fact or facts, then that fact or those facts, for all purposes of law and legal redress, exist and are true, and may be averred to exist and be true in a complaint or declaration or other pleading.

If, therefore, Davis is estopped by the facts alleged and proved in this case from denying that the California Court which granted said judgment of November 18, 1873, had acquired jurisdiction of his person and of the subject matter of said suit, and, therefore, from denying the validity of said judgment, the complainant is entitled in an action at law upon said judgment to aver in her complaint that the California Court had jurisdiction to grant the judgment or to aver facts showing that said Court obtained personal service of Davis, and had jurisdiction of the subject matter. In other words, in any action at law upon said judgment, complainant is entitled to aver *any and all* "jurisdictional facts" necessary at common law to the recovery upon *any* judgment.

Of course, if this proposition be sound, there can be no denial that the complainant would have in the action at law a "full, complete and adequate remedy at law."

The complaint on said judgment when so pleaded would not be demurrable. Defendant in said action would be driven to a denial of said averments or an affirmative defense thereto, and in either case plaintiff could use the estoppels by way of evidence. The remedy would be as ample as in case of the defense of the discharge in bankruptcy; and for the reason that equity refused to enjoin Davis from setting up his discharge in bankruptcy as a defense to the contemplated action at law, it ought to refuse to enjoin Davis from claiming the invalidity of the California judgment.

This position has not been, is not, and cannot be denied by counsel for complainant.

The most he has ever said in opposition to this position, admitting it to be sound, is that to plead as suggested would be to plead what is *not true*, but is *false;* that complainant cannot *truthfully* plead the jurisdictional facts, and that, *therefore*, a court of

equity, which is a court of *conscience*, will intervene to relieve complainant against the necessity of averring what is *false*.

In other words, according to counsel, a court of equity will intervene to relieve from the necessity of *fictitious* pleading in a court of law. This is surely placing Davis in a hole. In the first place counsel insists that the adequacy of the remedy at law must be determined not by the code system of pleading but by the common law system. By the code system, the necessity of fictitious pleading is done away, or, if not, that was the primary purpose of the system. At common law, fictions came to be the very heart of the system of pleading. Yet, when we accept counsel's position, and show that by the common law system, and by a fiction in which that system delighted, his client can have a "full, complete and adequate remedy at law," he says: "All you contend for is true. My client can plead as you say under the system which must be resorted to as the test of adequacy in the case; moreover, if she does so plead, there can be no doubt of the 'fullness, completeness and adequacy' of the remedy. But so to plead would be to necessitate the statement of what is *not true*, and that would be against my client's conscience, and, *therefore*, a court of conscience—that is, a court of equity—will intervene to prevent the necessity of this *untruthful*, this *fictitious* method of pleading."

That we are right in our claim that complainant is entitled to aver as *facts* what defendant is estopped to deny is shown by numerous authorities.

Title by estoppel is one of the best instances known of the application of the doctrine.

In the case of *Cuthbertson agst. Irving*, 4 H. & N., p. *752, the form of pleading in a declaration at common law where plaintiff's title is by estoppel is considerably considered.

In that case the action was by the assignee of the

lessor against the lessee upon a covenant to repair, made with the lessor and his heirs. The defendant, by one of his pleas, denied the assignment to the plaintiff, and alleged that the lessor had at the time of the demise no reversion, and that no reversion had vested in the plaintiff. Issue was joined upon this plea, and at the trial a special case was stated, by which it appeared that the lessor was without a legal title at the time of making the lease; that the lease did not in terms show the contrary, and that the assignment disclosed the want of title, but contained apt words to convey a reversion in fee. Judgment was given for the plaintiff.

Martin, *B.* (giving the opinion of the Court), at p. *758, says: "So long as the lessee continues in possession under the lease, the law will not permit him to set up any defense founded upon the fact that the lessor '*nil habuet in tenementis;*' and upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee. *A pleading test may be applied. Had the plaintiff declared that Biglands (that is, plaintiff's assignor and defendant's lessor) was seized in fee, and demised to the defendant, and assigned his reversion to the plaintiff, the defendant could not effectually have traversed the assignment. Could he the seizin? The plaintiff would have made a prima facie case by showing a lease to the defendant and possession taken and enjoyed under it, and defendant could not have showed any other estate in Biglands. He must, therefore, have said Biglands 'nil habuit in tenementis.' We are of opinion that the law will not permit him to do so.*"

Again, on appeal in the Exchequer Chamber, 6 H. & N., p. *135, Wightman, *J.* (speaking for the Court) says, at p. *139: "The lessor in this case, being a mortgagor in possession at the time

of granting the lease, had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessor, is only by estoppel; and if the lessor assigns, as he can only assign that which he has, his assignee will either have a title by estoppel against the lessee or no title at all. *In this case if the plaintiff had declared, in the old form, he would have stated the lessor to have been seized in fee, which, according to the cases, might have been traversed, and if it had, and it had appeared, upon the evidence, that the lessor had no legal title or interest whatsoever in the premises, but only an equity of redemption, the question is how ought the issue upon the traverse to be found. The answer is for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a legal title as would warrant the lease; and as no other legal title or interest is shown to have been in the lessor, it must be taken as against the lessee by estoppel that the lessor had an estate in fee.*"

This case arose subsequent to the Precedure Act of 1852 in England, and by declaring in the "old form" is meant by the common law system.

Here it is distinctly stated that the plaintiff could aver seizin in his assignor and the assignment to himself; that the defendant might traverse the seizin, and that the seizin would be established not by proving it as a fact, but by showing defendant estopped to deny it.

That, we contend, is just what complainant can do in her contemplated action at law.

This matter is considered by the learned editors of the ninth English edition of Smith's Leading Cases, and their result announced in the following terms (9th Am. Ed. of the 9th Eng. Ed., p. 202): "An estoppel does not necessarily involve a falsehood. On the contrary, facts are ascertained through the medium of estoppel, without reference to the question

whether really true or false; and it would be sheer fallacy to assume that a fact established by estoppel has *therefore* no real existence. *For judicial purposes it ought to be dealt with as if it really existed.*"

This is the rule for which we are now contending.

This question of pleading was very satisfactorily discussed in *Caldwell, Sheriff, &c., Applts., agst. Auger and Herbet, Respts.*, 4 Minn., 217. The action was brought by Auger and Herbet against Caldwell for recovery of the possession of a certain barge, alleged to belong to plaintiffs and to have been wrongfully taken by the defendant. The answer denied ownership in plaintiffs and alleged a part ownership in one Foret, and that defendant levied on the boat by virtue of an execution against Foret. The taking was alleged to have been June 7, 1860.

The plaintiffs showed that Foret sold his one-quarter interest to plaintiffs May 27, 1858, over two years before the levy. The defendant showed that he went to the boat to levy on some wood thereon, and there met the plaintiffs and was informed by Auger that the wood did not belong to Foret, and the other plaintiff, Herbet, said that one-half or one-third of the boat belonged to Foret, and asked the defendant why he did not levy upon the boat; and that thereupon he levied upon the boat. Judgment was given for the plaintiffs, and the Sheriff appealed.

Atwater, *J.* (delivering the opinion of the Court), says, at p. 222: "*It is claimed by the counsel for the respondents that under the Code an estoppel* in pais *should be pleaded in order that it may be given in evidence. It is not claimed, nor is it true, that this was necessary under the old system of pleading.* Nor do I find either on principle or authority that such pleading is required under the Code. The principles of pleading under both systems are the same. The *facts* upon which the parties rely were

not less required to be pleaded under the old system than under the new. *The fact necessary here to be pleaded and proved is that Foret owned an interest in the boat, and as to Herbet it is one and the same thing whether the defendant shows the allegation to be actually true or that the plaintiff himself at a certain time admitted it to be true; for the result is the same in the eye of the law.* It is in effect making a declaration of the plaintiff conclusive proof of the allegation in the answer, and the pleading of the statement of Herbet in the answer would in fact be pleading the proof, which, under any system, would be bad. *Herbet cannot object that a fictition of law (as it is termed by counsel) is pleaded, for as to him it is true.*"

The Court in effect says that the *actual truth or falsity* of the allegation is *immaterial;* and that, if plaintiff admitted that Foret had title, then, for purposes of pleading, it is the same as if he did; and the defendant was entitled to allege that Foret had title and to prove the allegation by proving the admission. This is but an illustration of the rule of pleading facts according to their legal effect.

In *Coleman* agst. *Pearce*, 26 Minn., 123, the same rule of pleading was applied in favor of the plaintiff. He alleged possession by defendants of certain grain. This allegation was denied. The Court, on the authority of 4 Minn., *supra*, sustained the form of pleading, and held that plaintiff should not plead the matter constituting the estoppel, but could allege a conversion and prove it by facts estopping defendant from claiming the contrary.

The case of *Griswold agst. Haven et al.*, 25 N. Y., 595, is almost identical with the last case and may be examined with profit on the question of pleading and proof.

In *Fall River Natl. Bk. agst. Buffington*, 97 Mass., 498, the plaintiff, as indorsee of a promissory note, sued defendant as endorser.

It appeared at the trial, that the endorsement of the defendant's name was a forgery; but there was evidence tending to show that before the notes were due, but after they had been discounted at the bank, the cashier showed then to the defendant for the purpose of ascertaining if what purported to be his signature was genuine, and, learning from him that it was, took no steps to collect the notes from the person who procured them to be discounted, as he otherwise would have done if he had not relied on the defendant's assurances.

Judge Hoar (delivering the opinion of the Court), says at p. 499, in discussing the rule of damages: "The action is not an action on the case for deceit; it is an action upon a promissory note. *The plaintiff alleged that the defendant endorsed the note in suit, and, instead of proving the fact affirmatively, proved, as by the rules of law they were entitled to do, that the defendant is estopped to deny that the endorsement is obligatory upon him.*"

See *Casco Bk. agst. Keene*, 53 Maine, 104, where, though the pleadings are not stated, it is clear from the nature of the action (assumpsit) that the plaintiff alleged the making of the note sued on by defendant, the defendant denied the making, and the plaintiff proved his case not by showing that defendant made the note, but by showing that the defendant was estopped to deny that he made the note.

One of the most valuable cases, however, on the question is *The Phila., Wash. & Balt. R. R. Co. agst. Howard*, 13 How., 307.

That was an action of *covenant* brought by Howard against the railroad company. The plea was *non est factum*. Under that issue the question was whether the contract sued on was or was not the contract of defendant; and that turned upon the further question whether the seal of defendant was or was not affixed by authority of defendant. Plaintiff was allowed to show that defendant had relied

upon this contract as the contract of defendant, in order to defeat a prior suit brought by the plaintiff. The defendant claimed that the seal was affixed without authority, and that in the former action a mistake had been made in admitting said contract to have been duly sealed. The Court *held* the defendant estopped to show the mistake or deny the validity of the sealing.

Curtis, *J.*, says, in speaking of an exception to the charge at p. 333: "It is objected that this instruction applied the doctrine of estoppel where the matter of estoppel had not been relied on in pleading. The rules on this subject are well settled. If the party has the opportunity to plead an estoppel, and voluntarily omits to do so, and denies or takes issue on the fact, he thus waives the estoppel and commits the matter to the jury, who are to find the truth, but if he have no opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence on the trial *under any issue which involves the fact*, and both the Court and the jury are bound thereby. * * *

"The plea of *non est factum* readily concludes to the contrary, and so the plaintiff has no opportunity to reply specially to any new matter of fact. He can only join the issue tendered, and if he were prevented from having the benefit of an estoppel, because he has not pleaded it, it would follow that the plaintiff could never have the benefit of an estoppel where the defendant pleads the general issue, for in no such case can he plead it. This was clearly pointed out in Trevivan agst. Lawrence, 1 Salk., 276, where the Court say that '*when the plaintiff's title is by estoppel and the defendant pleads the general issue, the jury are bound by the estoppel.*' And it is in this way that the numerous cases of estoppel *in pais*, which are in the recent books of report, have almost always been presented."

Here it will be seen that it never occurred to the

Court to question that plaintiff could allege in his declaration that the deed was the deed of the defendant, and establish the truth of said assertion by showing not that *in fact* and *in truth* said deed was executed by defendant, but by showing facts estopping defendant from denying the truth of the allegation that it was defendant's deed.

The case is an exceedingly instructive case, and when carefully studied solves the question why estoppels were never pleaded as part of a declaration at common law. The truth is that at common law the plaintiff *always* averred the existence of the fact in his declaration, and, if traversed, proved it, by proving NOT the *fact as alleged, but the facts estopping defendant from denying the truth of the fact alledged.*

We think we have demonstrated beyond a doubt the right of complainant in her complaint in the intended action at law to allege the jurisdictional facts necessary to show that the Court of California had jurisdiction to grant said judgment of November 18, 1873.

We think we have shown that if she can do so, she can adequately avail herself of all her estoppels in said action at law, and needs not the aid of a court of equity. Indeed, so much is conceded in paragraph XXXIII. of the complaint itself.

We believe that the Court will say that the only answer made to this position—namely, that it will force complainant to allege an *untruth*, and that equity will relieve her from this necessity—is unsound and absurd.

Equity does not exist as an auxiliary to tender consciences. It will afford aid and furnish a remedy when the law cannot, but equity, in deciding whether the law can and does afford an adequate remedy, does not attempt to play the reformer and say that a person has not an adequate remedy at law, because, in order to avail himself of that legal

remedy, he must, forsooth, allege what for judicial and legal purposes is true, but what in fact is not true. In short, equity does not afford relief against fictitious pleading in a court of law.

Surely it can need no additional argument to show that complainant cannot be said to be without a remedy at law, or a *full, complete and adequate remedy*, if she is entitled by any form of pleading in her intended action at law to avail herself of the facts constituting the estoppel.

Since the appeal in this case to this Court was taken, the complainant herein has begun her action at law on the law side of the United States Circuit Court for the Southern District of New York, Second Circuit. Despite the fact that the complainant had alleged in her bill of complaint that she could not *truthfully* assert that the judgment of November 18, 1873, was *duly* given, and that she was *therefore* remediless in an action at law, in the complaint which she has actually drawn, she does aver that the judgment was *duly* given by the California Court. It is to be observed that the original bill of complaint was verified by counsel, Mr. Maltby. It is also to be observed that the complaint in the action at law is also verified by her counsel, Mr. Maltby. In other words, he swears in the bill of complaint that he cannot truthfully allege a certain fact, and that his client is *therefore* remediless at law, and yet, when the action is brought, he finds no hesitation in swearing to the *untruth* that the judgment was *duly given* by the California Court. We think that these facts need no comment from us. We far prefer the practice of counsel as evidence of the law of New York and as evideuce of the adequacy of remedy, to the assertion in the bill of complaint, when he was under the stress of showing inadequacy of remedy.

He seems to feel more or less keenly the incon-

sistency of his position, for he refers to it at pages 41 and 42 of this brief.

We think we have demonstrated the two propositions we set out to establish: (1) that there are no estoppels which prevent Davis from claiming in an action at law on the California judgment of November 18, 1873, that it is invalid and void, for want of jurisdiction in the California Court to grant it; (2) that even if he is estopped, complainant has a "full, complete and adequate remedy at law."

If we have not established these propositions, we at least hope that we have shown that the questions raised by Davis' appeal are not frivolous, but deserve the most careful attention of this Court after the fullest possible argument, and that, therefore, the motion to affirm should be denied.

IV.

The motion to affirm should be denied, as well as the motion to dismiss.

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JOSEPH H. CHOATE,
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Counsel.

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Supreme Court of the U

ERWIN DAVIS *vs.* ANGELICA WAKELEE. No. 1185.

ERWIN DAVIS *vs.* PIERRE B. CORNWALL. No. 1186.

Supplemental Brief of Appellees on Motion to Dismiss and Affirm

We beg leave to submit a few remarks in answer to some citations of appellant in support of his second point contending that there is a complete remedy at law. (Brief III. p. 43—62.)

And first [a] he says that the estoppel can be pleaded in either New York State Courts or U. S. Circuit Court.

To support this he cites no New York case; but says there are "*intimations*" to this effect in 89 Ill. 102; 100 Ind. 123; 22 Iowa 324, and says these cases are decided as to practice under the code system of pleading.

Directly to the contrary are these cases also decided under the code system of pleading, 3 Cal. 302; 4 Minn. 156; 26 Minn. 123; 27 S. C. 226; 75 Wisc. 554.

Now which of these states furnishes Judicial decisions most in accord with the spirit of New York decisions?

Does not the action of counsel in citing foreign cases governed by foreign statutes as "*intimations*" only of what our law ought to be, show that in New York the law has not been settled and is still doubtful?

Indeed counsel has in this very case on demurrer maintained that the estoppels cannot be pleaded.

His briefs cited at p. 45 of my brief show this to have been then his position and Judge Shipman's opinion there cited shows the same admission.

Indeed our Court of Appeals shows a strong disapproval of

pleading estoppels *in pais* in a complaint in Andrews *v.* The Aetna Life Ins Co. 92 N. Y. 596—601 where the court says of such a pleading,

"It is an attempt on the part of the pleader, to frame a cause of action upon facts constituting an equitable estoppel, instead of averring the fact as to which the estoppel applies, and relying upon the estoppel to establish the fact upon which the right of action depends."

This case just quoted does not turn upon pleading a judgment whether void or valid and has nothing to do with the question treated hereafter as to whether Section 532 of the N. Y. Code governs our pleading or not.

It was held of estoppels in pais in Welland Canal Co. *v.* Hathaway 8 Wend. [N. Y.] 481. "Such estoppels cannot be pleaded, but are given in evidence to the court and jury" also 3 Harrington 90.

Furthermore the old maxim that an estoppel is to be "used as a shield not as a sword" shows that it is not to be pleaded as a cause of action. In the face of these New York decisions and in face of the confusion of decisions in other states on the same subject, I submit that this Court will not say that the New York Courts must decide this or that to be the law in New York when the question comes before them and will not compel us to take a doubtful course in pleading.

Under [b] Brief p. 51 Counsel tries to limit Section 532 N. Y. Code Civil Procedure to courts and officers of *Special Jurisdiction* by under scoring these last two words.

Section 138 of the Code of Civil Procedure enacted 1847, reenacted as Section 161, 1849, reads as follows:

"Section 161 [138] In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction but such judgment or determination may be stated to have been duly given or made.

If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction." See Lansing's Code of Civil Procedure [1874] showing all changes; Wait's Code [1873.]

Now the punctuation shows that the words "or officer of special jurisdiction," are parenthetical. In follows then that the word "court" is not limited by the words "of special jurisdiction" and must mean any court whether of general or special jurisdiction.

When the new Code of Civil Procedure was enacted in 1877 this old section became section 532 quoted in my brief p. 41, and the only change made that could be claimed to touch this point was to drop the comma after "court."

This court has decided that upon a revision of a statute a mere unsubstantial change of phraseology will not be construed as a change of law unless evidently intentional. McDonald *v.* Hovey 110 U. S. 619.

The New York Courts say that Sec. 532 of new code is "simply a reenactment of Sec. 161 of the preceding Code."

De Nobele *v.* Lee 47 N. Y. Super. R. 372.

This being so, of course, it governs the judgments of courts of special and of general jurisdiction.

Seeing then that this section 532 covers both kinds of courts, does it govern judgments of sister states? This as I have shown in my brief p. 42—44 is doubtful.

And this is enough to entitle us to the injunction granted in our decree.

Drexel *v.* Berney 122 U. S. 241.

If section 532 does govern the pleading of such a Judgment as that involved here then we have nothing to do with fictitious pleading as treated of by counsel in his brief pp. 53—60 : for in Horton *v.* Shipherd 14 Weekly Dig. 453 the N. Y. Supreme Court decides that such fictitious pleading is not good and that either the jurisdictional facts or that the judgment was duly given must be alleged.

McLaughlin *v.* Nichols 13 Abb. P. 244 holds that a complaint containing no averment of facts to give jurisdiction to the court, in which the Judgment was rendered, either of the persons of the defendants or of the cause of action is bad : that it should show jurisdiction of the person.

In the cases cited by appellant to support the view that the fiction should be pleaded rather than actual facts, the very estoppel put in evidence was competent to prove the fact as asserted. Here

the evidence of the entry of the judgment is the judgment roll which shows on its face that the judgment is void.

Counsel dwells with much insistence upon the fact that in the action at law upon the judgment involved here, begun since the decree was entered upon which this appeal is taken, the complaint alleges that this judgment was duly given.

Of course on the regular argument of this appeal this pleading is outside of the record and cannot be regarded. But that complaint was made in that form because this decree expressly declares (and an injunction exists to the same effect) that Davis shall not deny in any way whatsoever that such judgment was duly given. This of course is equivalent to allowing us to so plead without contradiction.

That complaint is then authorized by the decree and injunction.

We submit :

(A) that it is quite clear Davis is estopped from denying that the Judgment of Nov. 18th. 1872 is valid and in full force ; that every argument to the contrary is frivolous and the principle involved has often been decided by this court ;

(B), that it is equally clear that the decisions of New York render it so doubtful as to how the complaint at law shall be drawn that even Appellant is driven now into contradicting his own briefs below and thus shows the doubt in higher relief. That Judge Shipman's opinion also recites that this ground of equity is conceded by Davis, and after such concession we submit the defendant had no right to appeal against that admitted doctrine and if he had, he was fully aware of the doubt existing if he is honest in both his positions ;

(C), that it follows then in view of the certainty of the first proposition and the acknowledged doubtfulness of the law set up in the second proposition, this appeal must have been taken without hope save only for delay.

Respectfully submitted,

ANSON MALTBY.

Counsel for Appellee.

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Supreme Court of the United States.

ERWIN DAVIS,
Appellant,
against
ANGELICA WAKELEE,
Appellee.
No. 181.

ERWIN DAVIS,
Appellant,
against
PIERRE B. CORNWALL,
Appellee.
No. 182.

Appellant's Brief on Appeal from Decree of the Circuit Court of the United States for the Southern District of New York.

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1894.

Supreme Court of the United States.

ERWIN DAVIS, *Appellant,* *against* ANGELICA WAKELEE, *Appellee.*	*No. 181.*
ERWIN DAVIS, *Appellant,* *against* PIERRE B. CORNWALL, *Appellee.*	*No. 182.*

Brief on Behalf of the Appellant.

STATEMENT.

This is an appeal taken by Erwin Davis from the decree in an equity suit, made by the Circuit Court of the United States for the Southern District of New York—a decree which enjoined Mr. Davis from pleading a valid legal defense, not in an ac-

tion at law already brought, but in any action at law to be brought, in any part of the world, at any time in the future. He was enjoined from ever disputing the validity of a judgment recovered against him in California, which judgment itself is conceded by all parties to be absolutely void. The facts in the two above cases are practically identical, and the questions involved are identical, and therefore, we shall argue only the questions presented in the first case.

The bill of complaint in the first above-named suit, after alleging the citizenship of the respective parties, states that during the months of August and September, 1869, the appellant made and delivered his certain promissory notes to one H. P. Wakelee, aggregating in amount $15,720 (Record, fols. 1 to 4) which, after various transfers, came into the possession of the appellee. On or about September 11th, 1869, Davis filed in the United States District Court, in the District of California, his petition to be adjudged a voluntary bankrupt, and, thereafter, on or about September 30th, 1869, a decree was entered pursuant to said petition (Rec., fol. 45).

Henry P. Wakelee proceeded to prove up his debt as evidenced by said notes in the bankruptcy proceedings, but on or about June 28th, 1873, Wakelee filed in the bankruptcy court a petition for leave to sue Davis, and on July 8th, 1873, an order was granted which gave Wakelee leave to "commence any action or actions at law, or suits in equity, against said Erwin Davis, the bankrupt herein, as he may be advised in any court or courts in any city or county having *jurisdiction of the person or property* of the said Erwin Davis" (Record, fols. 46 and 67). Pursuant to said order Wakelee, during the month of July, 1873, began an action against Davis in the District Court of the Fifteenth Judicial District of the State of California (a court of record) without personal service of summons upon Davis, and without any proceed-

ing *in rem*. On or about the 18th day of November, 1873, pursuant to the summons thus served by publication, and without the attachment of any property of Davis, Wakelee obtained a judgment against Davis, the appellant herein, in the said District Court of the Fifteenth Judicial District of the State of California, by the terms of which it was ordered, adjudged and decreed, that Wakelee recover of Davis, in United States gold coin, the sum of $22,809.26 (Rec., fol. 46).

On December 23d, 1875, Davis filed in the United States District Court a petition for his discharge as a bankrupt, to which, on or about February 23d, 1876, Wakelee filed specifications of opposition (Rec., fol. 47). The grounds and reasons of opposition are set forth in Exhibit C (Rec., fols. 68–71).

On March 18, 1876, Davis gave notice of motion that he would move to cancel the proof of debt, and for an order dismissing and disregarding the specifications of opposition filed by Wakelee, one of the grounds being that, after Wakelee had proved up his claim in the bankruptcy proceedings, he had thereafter obtained leave to sue on said debt, and had entered ju gment, and that said judgment still stood of record and was in full force. The petition and notice of motion are found at folios 71–5, Record.

This motion came on to be heard on July 20, 1876, and argument was made by counsel for both parties. It is alleged in the bill that it was claimed, declared, admitted, and assurance was made in open court, by counsel duly authorized thereto, for and in behalf of the said defendant Davis, that by reason of the facts alleged and recited in said petition and notice of motion, that the original debts of Davis due Wakelee, which had been proved up in bankruptcy, had merged in said judgment of November 18, 1873, and that said judgment was subsisting, valid and enforceable, and that said judgment would not be barred or discharged, or in any wise affected by the discharge

in bankruptcy proceedings of the defendant Davis, &c. (Rec., fols, 48–9).

An order was entered on October 31, 1876, which cancelled the proofs of debt which Wakelee had made in the bankruptcy proceedings and dismissed his specifications of opposition. This order is found at folio 75 of the Record.

The bill further alleges that said Henry P. Wakelee relied upon and believed, and accepted as true and binding, the said claims, admissions, declarations, assurances, representations and allegations of said Davis by his said attorneys and counsel, to the effect that such judgment was valid and binding on him, the said Davis, and that the same would not, and should not, be barred or in any wise affected by any discharge in bankruptcy of said Davis in said bankruptcy proceedings; and said Wakelee was thereby induced to believe and accept, and did believe and accept as binding and correct in law, the said decision and order of the said United States District Court, and by reason of said admissions, declarations, assurances, allegations and representations, was induced to accept, and did accept, said order, *and did not appeal therefrom* (Rec., fol. 50, par. 22 of bill).

The bill of complaint, in substance, further alleged, that the plaintiff intended to bring an action at law upon the California judgment in the State of New York, where Davis resided. That to this contemplated action Davis had two defenses: (1). That the California judgment is void for want of jurisdiction in the California court to grant it, the Court never having had jurisdiction of the person of Davis. (2). The discharge in bankruptcy obtained by Davis subsequent to said California judgment. The bill alleged that Davis threatened to make use of both of said defenses to the intended action at law on said judgment (Rec., fols. 52–53).

The bill further alleged facts which plaintiff claimed should be held to estop Davis from insist-

ing upon either defense in said contemplated action.

The reason alleged for going into a court of equity was, that complainant could not, in New York, where she was going to bring her contemplated action, make use in the law action of the facts which she claimed constituted such estoppels. The ground of this inadequacy of remedy at law was thus alleged in paragraph 33 of the amended bill (Rec., fol. 53).

"*That under the law of the State of New York, where said action is to be brought, in an action at law to recover the amount due upon said judgment, the facts subsequent to said judgment as hereinbefore set forth and constituting the estoppels, as herein claimed and insisted upon, may not be pleaded in the plaintiff's complaint, or as in aid of a cause of action, but that such action must be brought upon such judgment alone, and that by the law of the State of New York it is necessary, in an action at law upon such judgment, to allege in the complaint either the facts showing the jurisdiction of the Court in which the judgment was entered, or that the judgment was duly entered, and that unless this be done, the complaint would be dismissed on demurrer; that your oratrix is unable* TRUTHFULLY *to allege in such complaint such jurisdictional facts, or that such judgment was duly entered, and that your oratrix is thus remediless in an action at law to maintain her rights under said judgment and under the facts hereinbefore set forth.*"

The relief asked for was an injunction against Davis restraining him from claiming in any action upon said California judgment, that said judgment was void, and also restraining him from setting up as a defense thereto his discharge in bankruptcy (Rec., fols. 54–5).

The bill as originally brought was wholly wanting in equity. It showed no ground of equitable jurisdiction in addition to the alleged equitable estoppel. It was also particularly vicious in de-

manding no relief at all, except the recovery of money damages (see Record, pages 1 to 6). This bill was demurred to and Judge Coxe sustained the demurrer (see Record, page 18). The complainant then amended her bill, claiming an injunction and claiming as the equitable ground of jurisdiction, in addition to the estoppel, that the complainant could not plead at law. The allegation of the bill on this subject has been stated above.

The case again came before the lower court on demurrer to the amended bill, and its decision (Record, page 39) is found in 38 Fed. Rep., 878, overruling the demurrer.

On final hearing upon the pleadings and proofs, the facts were the same as on the argument of the demurrer, and the judge before whom the case came felt constrained to follow the decision on the demurrer (see 44 Fed. Rep., 532), (Rec., page 89). Plaintiff obtained a decree restraining Davis from insisting upon the invalidity of the California judgment in any suit in any jurisdiction, but the Court refused to restrain Davis from setting up his discharge in bankruptcy as a defense to any contemplated action.

The Court, following the decision on the demurrer, decided that the facts alleged and proved estopped Davis from insisting that the California judgment is void for want of jurisdiction in a California court to grant it, and held that the suit was of equitable cognizance and granted an injunction on the ground that plaintiff, in the contemplated action at law, could not avail herself of such facts constituting said estoppel.

The Court declined to decide whether the facts alleged and proved estopped Davis from setting up his discharge in bankruptcy as a defense in said contemplated action at law. The reason for refusing to decide this question was, that plaintiff, in said action at law, could adequately avail herself of the facts alleged to constitute such estoppel, and

therefore it was for that Court to pass on the question of estoppel.

The said decree was entered March 9, 1891. Davis appealed therefrom to this Court on April 16, 1891, and the record was filed in this Court May 22, 1891.

The plaintiff hereby assigns the following as errors committed by the court below:

First.—In that the Court held that the bill of complaint stated a cause of equitable cognizance.

Second.—In that the Court found, as stated in its opinion, that the plaintiff had not a full, complete and adequate remedy at law.

Third.—In that the Court found, as stated in its opinion, that Davis asserted the validity of the judgment of November 18, 1872.

Fourth.—In that the Court admitted in evidence the alleged arguments of counsel on the motion, which resulted in the order of October 31, 1876.

Fifth.—In that the Court found, as stated in its opinion, that Davis was estopped from asserting the invalidity of the judgment of November 18, 1872.

Sixth.—In that the Court did not dismiss the bill of complaint.

Seventh.—In that the Court entered a decree restraining Davis from setting up the invalidity of said judgment.

Point I.

The suit is wholly lacking in equity.

The bill seeks to enjoin Mr. Davis from pleading a defense at law. It is not pretended that there is any action pending. The relief desired is to enjoin Mr. Davis from pleading in an action which the complainant proposes to bring. It is not unusual to enjoin an action at law in cases where the *defendant*, by reason of the rigid practice at law, is unable to avail himself of some equitable defense. We have not been able to find any cases which even allow the complainant in an equity suit to enjoin a *defendant* from pleading a defense in an action at law *already pending*, still less can we find any authority for such an injunction as this which operates with respect to the *whole world*, at *all* times and with respect to an action *not in existence* and which may *never* be brought.

The reason given by complainant for resorting to equity in this action is found at paragraph XXXIII of her amended bill (Rec., fol. 53), where she alleges that

> "under the law of the State of New York, where said action is to be brought, in an action at law to recover the amount due upon said judgment, the facts subsequent to said judgment, as hereinbefore set forth and constituting estoppels, as herein claimed and insisted upon, may not be pleaded in the plaintiff's complaint, but that such action must be brought on such judgment alone, and that by the *law of the State of New York* it is necessary, in an action at law upon such judgment, to allege in the complaint either the facts showing the jurisdiction of the Court in which the judgment was entered or that the judgment was duly entered, and that unless this be done, the complaint would be dismissed on demurrer; that your oratrix is unable *truthfully* to allege in such complaint such jurisdictional facts, or that

> such judgment was duly entered, and that your oratrix is thus remediless in an action at law" &c. (Record, fol. 53).

If a bill in the United States courts lacks equity, such courts have no jurisdiction to entertain the bill. The Revised Statutes of the United States provide, at Section 723, as follows:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

Now, whether the remedy be adequate at law or not, depends upon the question whether the remedy at law was adequate in England and the United States prior to the adoption of the Constitution.

> Mississippi Mills *v.* Cohn, 150 U. S., 202;
> Payne *v.* Hook, 7 Wall., 425, 430;
> McConihay *v.* Wright, 121 U. S., 201, 205.

It is well said that equity jurisdiction depends upon two facts—the existence of equitable interest and the inadequacy of legal remedies.

> 1 Pomeroy's Equity Jurisprudence, 133.

It is well known that estoppels may be availed of in a court of law, and "in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law."

> Dickerson *v.* Colgrove, 100 U. S., 578;
> Drexel *v.* Berney, 122 U. S., 241.

If there be an adequate remedy at law, the United States Courts, of their own motion, and

without the action of the parties, will dismiss the bill.

Parker *v.* W. Lake Co., 2 Black, 545;
Knox *v.* Smith, 4 How., 298;
Wright *v.* Ellison, 1 Wall., 16;
Hungerford *v.* Sigerson, 20 How., 156.

Instances are numerous where, in the United States courts, bills have been dismissed for want of equity because there was an adequate remedy at law.

Smythe *v.* New Orleans Co., 141 U. S., 656;
Scott *v.* Neely, 140 U. S., 106, 110;
Whitehead *v.* Shattuck, 138 U. S., 146;
Russell *v.* Clark, 7 Cranch., 89;
Thompson *v.* R. R., 6 Wall., 134;
Insurance Company *v.* Bailey, 13 Wall., 616;
Hipp *v.* Babin, 19 How., 271;
Grand Chute *v.* Winegar, 15 Wall., 373;
Lewis *v.* Cocks, 23 Wall., 466;
Root *v.* R. R., 105 U. S., 189;
Killian *v.* Ebbinghaus, 110 U. S., 568;
Buzzard *v.* Houston, 119 U. S., 347.

When a party comes for the first time into a court of the United States to obtain its aid in enforcing a judgment of a state court, he must have a cause of which the former court can entertain original jurisdiction.

Mississippi Mills *v.* Cohn, 150 U. S., 208;
Christmas *v.* Russell, 5 Wallace, 290.

We will now test this suit by the rules which we have shown regulate courts of equity.

Point II.

The bill shows a want of equity on its face and for the following reasons:

(*A*). It is a suit to declare future rights with respect to an action at law which is not pending.

(*B*). There is no possible cause of action at law, because,

(1). The judgment is void and a court of equity can not prevent the law court from acting of its own motion.

(2). The judgment is void because never properly perfected under the leave of the bankruptcy court.

(3). The record shows that whatever may be true about the judgment, it is wholly *discharged* by reason of Mr. Davis's final discharge in bankruptcy.

We shall take up these points in the foregoing order.

(*A*). THE BILL SHOWS THAT THE SUIT IS ONE TO DECLARE FUTURE RIGHTS AND TO AFFECT BY INJUNCTION AN ACTION AT LAW WHICH IS NOT, AS YET, PENDING.

A court of equity will not take jurisdiction simply to declare future rights.

Cross *v.* De Valle, 1 Wall., 1.

Courts of equity act upon present rights or past situations. They do not purport to declare what shall be in the future the rights or the position of a party. This bill, however, attempts to adjudicate for the future and to determine what shall be Mr. Davis's rights at some unknown time, if something

else shall happen, namely, the bringing of an action at law against him. We submit that courts of equity are not created for this purpose.

Again, the action is unprecedented. We, of course, do not dispute that when an action at law is actually pending, the defendant often obtains a stay by injunction of the action, when he has some equitable defense which cannot be employed in the action at law; but this is because there is an action in existence, and because the defendant has a present trouble and difficulty. We have been unable to discover any case which gives a shadow of authority for the present suit. We are unable to find a case which holds that a complainant can secure an injunction to prevent the defendant from pleading a defense, even in a pending action at law, and still less is any authority to show that either a proposed plaintiff or a proposed defendant can secure an injunction to affect the action of the other party with respect to some litigation which is not and never may be pending.

(*B*). THERE IS NO POSSIBLE ACTION AT LAW WHICH IN THE FUTURE COULD BE AIDED BY THE INJUNCTION IN THIS SUIT.

1. *Because the judgment which appears in the bill and the evidence is absolutely void.*

This bill, if it be anything, is one appealing to the auxiliary jurisdiction of a court of equity. Assuming that such a bill would lie, it ought to show that the complainant has a *good cause of action at law*, to which the defendant has an apparently legal defense which it would be unjust that he should avail himself of, and that, in the law action, the complainant cannot avail himself of the facts which make the defense unjust.

Now, it is conceded by all parties that the California judgment is not merely voidable but is absolutely void.

Pennoyer *v.* Neff, 95 U. S., 714.

Such a judgment can always be attacked for want of jurisdiction.

Christmas *v.* Russell, 5 Wall., 290.

Now, inasmuch as the judgment is absolutely void, a court of equity has no power to give it force or validity, directly or indirectly, on any theory including the theory of equitable estoppel.

What is void at law cannot be made valid by estoppel.

In Parkersburg *v.* Brown, 106 U. S., 487, this Court held that, where certain State bonds were absolutely void because of the unconstitutionality of the statute which created them, it could not be claimed that the State, by its acts, could in any way give them validity or could be estopped to claim that they were void.

A void judgment cannot be confirmed, validated or enforced by any subsequent proceedings taken in a court of equity.

Ray *v.* Ray, 1 Idaho, 566.

Equity follows the law. It does not and cannot create or revive legal rights.

Magniac *v.* Thomson, 15 How., 281.

The following case seems to be strictly applicable.

Hedges *v.* Dixon County, 150 U. S., 182, 192, and cases cited.

> "The fact that complainants have no remedy at law arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford relief.
>
> The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac* v. *Thomson*, *15 How., 281, 299*, that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power

to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.

Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard *statutory* and *constitutional* requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the *transaction*, or the *contract*, is declared *void* because not in compliance with *express statutory* or *constitutional* provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof. These general propositions clearly establish that the present bill cannot be sustained."

Illustration: Suppose that Mr. Davis should not answer in the contemplated action at law. How, upon the facts, could a court of law enter judgment? It would appear by the record that judgment was asked upon a California judgment absolutely void. Why, then, should a court of equity enjoin Mr. Davis from pleading that the judgment is invalid? The only effect would be that when the action at law is brought, if Mr. Davis has no other defense, the injunction will operate, and he cannot answer and does not answer. This being the case, will the injunction in any way cure the invalidity of the void judgment? The situation will be the same as though Davis had voluntarily refused to answer. The court of law, however, would have no power to grant judgment upon a void judgment.

Even assuming that Mr. Davis had other defenses, even assuming that the injunction was before the law court, and that all the facts constituting the estoppels were before the law court, and that Mr. Davis, prevented by the injunction, could not move to dismiss because of the invalidity of the

judgment, how would that, in any way, give to the law court jurisdiction to enter or direct judgment? It would still appear that the cause of action itself was no cause of action; that the judgment declared on was void.

We say, therefore, that it appeared clearly in this suit that there was not, and could not be, any cause of action which could be aided by equity. The complainant claims that equity will interfere in cases of reformation of deeds or to set aside fraudulent conveyances where a party has no remedy at law, no cause of action at law. The distinction, however, is that these instrument are not void, but are merely voidable.

The complainant claims that equity is not bound by strict rules of law, but the answer is that equity never will revive extinct legal rights, nor will equity create legal rights which do not exist.

It is claimed by complainant that the injunction would go, as it usually does, against the party, and that the law court would not dismiss the cause of action because it would not act without an objection, and the defendant enjoined could make no objection.

While it is true that equity acts upon the party, it is likewise true that equity can not change the legal situation. In this case it seems absurd to suppose that a law court, knowing, necessarily, that the cause of action is void, would entertain jurisdiction and direct judgment although the defendant made no motion. Take the following as an illustration: Suppose that a party in a gambling transaction gives his I. O. U., and the other party brings suit on it. No defense is interposed. It becomes necessary, on the inquest taken, to show the facts, and it appears that the I. O. U. was given for a gambling debt. The defendant is not even present and makes no motion. Can it be conceived to be the duty of the Court, under these circumstances, knowing that the cause

of action is illegal and that the I. O. U. is void, to allow a judgment, although the defendant does not appear and makes no motion? Clearly not. And how would the case be different if the defendant had been enjoined from pleading any defense? It would not possibly change the aspect of affairs.

We claim, therefore, that it clearly appeared that the complainant had no cause of action at law whatsoever, and that equity had no power either to validate the judgment or to enjoin Mr. Davis from pleading his legal defense.

2. *The judgment was void for another reason, which appeared upon the record. The only leave which was granted by the Bankruptcy Court to bring suit against Davis was as follows:*

> "It is ordered, That the said H. P. Wakelee have leave, and leave is hereby granted him, to commence any action or actions at law, or suits in equity, against Erwin Davis, the bankrupt herein, as he may be advised in any court or courts, in any State or country, *having jurisdiction of the person or property of the said Erwin Davis*" (see Record, page 12).

Now, the very record shows that no such suit was ever begun in any court having jurisdiction of the person or property of Davis. The leave of the Bankruptcy Court was not complied with, and the very record showed the invalidity of the judgment for this additional reason.

3. *The bill and the record also showed that there was no cause of action at law, because the judgment had been discharged by Mr. Davis's final discharge in bankruptcy. No new promise was shown to take the judgment out of the statute.*

Of course, it is clear, if there is no possible cause of action at law the suit in equity would have no foundation.

Now, the Court below should have held that, irrespective of the question whether Mr. Davis was

estopped to deny the judgment or not, nevertheless, Mr. Davis, having been discharged, the judgment was likewise discharged and no cause of action could be predicated upon it.

It is, of course, law that a judgment recovered, as was this judgment, prior to Mr. Davis's discharge and after he was adjudicated as a bankrupt, is wholly barred and discharged by the final discharge of the bankrupt.

Boynton *v.* Ball, 121 U. S., 457.

Hence, there could be no possible action at law on the judgment and no need of an injunction.

The equity court should have ruled that nothin the bill or the record showed, or could show, that Mr. Davis would be *estopped to plead his discharge;* should have held, therefore, that the discharge was a complete bar, and should have dismissed the bill because there could be no action at law.

The reasons why Mr. Davis was not estopped to plead his discharge, and to rely upon it, are, generally speaking, the same as the reasons why Mr. Davis is not estopped to deny the validity of the judgment. These reasons are very fully set forth in a subsequent point in this brief. *In addition,* the bill and the record showed the following reasons why the discharge could not be attacked or invalidated.

If it be claimed that the order of the bankruptcy court, dismissing the specifications of Wakelee, was an adjudication, it, nevertheless, could have no effect as an adjudication upon something which was to happen in the future. The discharge was not then in existence.

Furthermore, this order could not adjudicate as to the subsequent effect of a law of Congress. Congress had provided what the effect of a discharge in bankruptcy should be, and no court can adjudicate in advance as to what shall be the effect of a discharge. When a discharge takes place its effect

depends not upon what some court has said previously, but upon the law which authorizes the discharge.

If it be claimed that Mr. Davis's representations on the argument of the motion were that the discharge would not invalidate the judgment, it may be answered that statements with respect to future facts and conditions are mere expressions of opinion and do not form the basis of an estoppel. "The facts, represented or concealed, must be either existing or past, or, at least, represented so to be."

2 Pomeroy's Equity Jurisprudence, sec. 808, page 273;
Jordan *v.* Money, 5 H. L. Cas., 185;
Langdon *v.* Doud, 10 Allen, 433;
White *v.* Walker, 31 Ill., 422, 437;
White *v.* Ashton, 51 N. Y., 280.

Furthermore, any representations made in court were mere arguments—mere conclusions of law—mere representations of questions of law which were then doubtful.

At this time the decisions were at variance on the subject of such a judgment and its effect.

Davis's representations were opinions of an uncertain question of law.

Diversity in decisions as to the discharge:

1. Such a judgment would not be discharged.

Re Gallison, 5 N. B. R., 353;
Re Williams, 2 N. B. R., 2d Ed., 229;
Re Leibenstein, 4 *Chicago Legal News*, 325;
Bradford *v.* Rice, 102 Mass., 472;
Bowen *v.* Eichel, 91 Ind., 22 (1883);
Steadman *v.* Lee, 61 Ga., 59 (1878);
McCarthy *v.* Goodwin, 8 Mo. Appeals, 380 (1880);
Wise's Appeal, 99 Pa. St., 193 (1881);

Brown *v.* Morange, 108 Penn. St., 69 (1884);
Miller *v.* Clements, 54 Tex., 351 (1881);
Evarts *v.* Hyde, 51 Vt., 183;

2. Such a judgment would be discharged.

Cornell *v.* Dakin, 38 N. Y., 253 (1868);
Monroe *v.* Upton, 50 N. Y., 593 (1872);
Re Brown, 3 N. B. R., 3d Ed., 585 (1870);
Re Vickery, 3 N. B. R., 2d Ed., 696 (1870);
Re Crawford, 3 N. B. R., 698 (1870);
Re Stansfield 4 Sawyer, 334 (1877);

3. Case finally deciding the matter.

Boynton *v.* Ball, 121 U. S., 457 (1887).

It, therefore, appears that any representations made were statements as to the law; they were not untrue; they were simply the opinion of counsel as to which lines of decision of the Circuit Court would be likely to be sustained by the Supreme Court. They could not be intended to mislead, because both parties knew, or were presumed to know, the law, and were, therefore, not such representations as could be relied upon. We will briefly set out here additional reasons which we discuss in full later, why Mr. Davis could in no manner be estopped to plead his discharge in bankruptcy. These are—

1. The order of the bankruptcy court was not *res adjudicata* because interlocutory.

2. If the order was *res adjudicata*, then it was not binding with respect to the question whether the judgment would be discharged, because—

(*a*). The question was not before the Court.

(*b*). The second proceeding in which the question arises is for a different cause of action.

(*c*). It was not necessary to have decided the question of the discharge; and

(*d*). The oral evidence of arguments of counsel as to what was adjudicated are not evidence.

3. There was no possible estoppel *in pais*, because—

(*a*). Davis did not assert that the judgment would not be barred.

(*b*). The representations were of law.

(*c*). They were not untrue.

(*d*). They were known to both parties.

(*e*). Were not intended to mislead.

(*f*). Wakelee had no right to rely upon them.

(*g*). The statements were merely *ex parte*.

(*h*). In fact, they were not relied upon.

(*i*). Davis gained no benefit from making them; and

(*j*). Wakelee suffered no detriment.

Now, in the equity action below all the facts with respect to *all possible estoppels claimed* were before the Court. The bill requested an injunction to prevent Davis from denying the judgment *and* from pleading his discharge, *and all the evidence the complainant had on both of these points was given.*

It, therefore, appeared, no matter what the Court might determine with respect to the judgment, that there was a valid discharge in bankruptcy concerning which no estoppel possibly could operate, and hence, that there was NO JUDGMENT concerning which Davis could possibly be estopped, and that there was no cause of action which could be aided

by equity. Now, whether the judgment was valid or invalid, whether Davis could repudiate it or not, were entirely immaterial questions. THE JUDGMENT WAS DEAD, GOOD OR BAD. The discharge was valid and could not be attacked.

These being the facts, and this being the law, how was it possible for a court of equity to issue an injunction against Davis with respect to a defense in a contemplated action at law, when it clearly appeared that for another and independent reason *there was not, and could never be, any such action at law? The judgment was non-existent.*

Point III.

Upon any theory of the case, it is clear that there was an adequate remedy at law.

Our argument under this point is as follows:

There was an adequate remedy at law because—

(*A*). The bill claimed that in New York it was necessary to plead in a certain way in an action upon a judgment; it is not the fact that a party must so plead; and the bill does not show that the complainant cannot plead in the manner which, in New York, is the proper mode of pleading.

(*B*). The complainant could have sued at law without any aid from equity, because—

(1). He could plead generally on the judgment without alleging jurisdiction, either of the court or over the party.

(2). He could have pleaded his estoppels in a declaration in a law action.

(3). He could have pleaded what would be legally true without danger of perjury.

(*a*). By pleading jurisdictional facts at common law or under the Code;

(*b*). By pleading that the judgment was duly recovered under the Code;

(*c*). And if this would be perjury, he could so plead without verifying his complaint.

No Injunction should have Issued, as there was an Adequate Remedy at Law.

It is conceded that there must be some ground of equity besides the equitable estoppels, in order to give the equity court jurisdiction.

Dickerson *v.* Colgrove, 100 U. S., 578;
Drexel *v.* Berney, 122 U. S., 241;
Barnard *v.* German American Seminary, 49 Mich., 444;
Judge Shipman's Decision, Record, page 43.

The reason given by the judge below, of entertaining equitable jurisdiction, was as follows:

> "That in an action at law upon a judgment in the State of New York, it is necessary to allege in the complaint, either the facts showing the jurisdiction of the court in which the judgment was entered, or that it was duly entered, and, unless this is done, the complaint will be dismissed on demurrer. It thus appears that it is uncertain whether Cornwall (Wakelee) could so frame his complaint as to be able to obtain a standing in a court of law unless Davis should be prevented from taking advantage of the defective jurisdiction of the California court, and that it is

> improbable that the plaintiff could, at the outset of his case, avail himself of this estoppel, so as to gain a foothold in court. It follows that a case is stated—in that part of the bill which relates to the defense of the invalidity of the judgment—which entitles the complainant to relief in a court of equity."
>
> (Drexel *v.* Berney, 122 U. S., 241; Record, page 43.)

That the Court was gravely in error in this respect, we will now show.

(*A*). THE RELIEF CLAIMED IN THE BILL IS FOUNDED ON THE ALLEGATION THAT IN NEW YORK, IN PLEADING ON A JUDGMENT, IT IS NECESSARY, IN AN ACTION AT LAW, TO ALLEGE IN THE COMPLAINT EITHER THE FACTS SHOWING THE JURISDICTION OF THE COURT OR THAT THE JUDGMENT WAS DULY RECOVERED.

This is not law. A plaintiff does not have to plead in this manner (see cases below). Now, this not being the law, it does not appear in the bill or the record that the plaintiff cannot plead in the legal manner, or in the customary manner, and hence it must be assumed that the plaintiff could so plead and that the plaintiff had an adequate remedy at law.

The allegation of the bill is predicated upon Section 532 of the Code of Civil Procedure of the State of New York, which simply states that in pleading on a judgment of a court of *special jurisdiction*, it is not necessary to state the facts conferring jurisdiction, but the judgment may be pleaded as duly recovered.

We will show, in a succeeding point, that this section of the Code simply changed the common law rule of pleading on judgments of courts of *special* jurisdiction, but has nothing to do with the ordinary rule which still exists in New York and elsewhere concerning pleadings on judgments of courts of *general* jurisdiction. The bill says that it is necessary to state *facts showing the jurisdiction of the*

court. This was *never* necessary where the judgment was recovered in a court of general jurisdiction. The bill says that the only other way is to plead that the judgment was duly recovered. This is predicated upon the Code. It simply applies to judgments of inferior courts.

The bill, therefore, relies upon the Code or upon rules of pleading which apply only to judgments of inferior courts.

The bill does not show, however, that it is impossible in the State of New York to plead on a judgment of a court of general jurisdiction and it must be assumed that the complainant can so plead and has an adequate remedy at law under the common law.

(*B*). THE COMPLAINANT CAN SUE ON THIS JUDGMENT AT COMMON LAW WITHOUT ANY AID WHATSOEVER FROM EQUITY.

1. The complainant can plead at law generally upon this California judgment without alleging either the jurisdiction of the court over the person or that the court was a court of general jurisdiction.

As we have seen, the complainant says that he must either plead the jurisdictional facts or that the judgment was duly recovered. We will now set out at large the section of the Code which he evidently relies upon. It reads as follows:

> "Section 532.—In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly made or given."

This section of the Code simply modifies the rule at common law to the effect that in pleading on judgments of inferior courts, the jurisdictional facts must be shown. This was the evil which needed a remedy, and the Code allowed such judg-

ments to be pleaded as duly given. There are similar provisions in other Code States which are only applicable to pleading on judgments of inferior courts.

See Bliss on Code Pleading, Sec. 303, and Note 1.

Now, prior to the Code, the following was the law, with respect to pleading on a judgment of a court of special jurisdiction.

At common law, in pleading on a judgment of a court of special jurisdiction, it was necessary to plead the facts which conferred jurisdiction, both of the subject matter and of the person.

Sheldon *v.* Hopkins, 7 Wend., 435;
Stiles *v.* Stewart, 12 Wend., 473;
Thomas *v.* Robinson, 3 Wend., 267;
Cleveland *v.* Rogers, 6 Wend., 438;
Sollers *v.* Lawrence, Willis, 413;
Mills *v.* Martin, 19 Johnson, 7.

The complainant seems to think that in pleading he must plead the jurisdictional facts referred to in Section 532 of the Code. In this, however, he is mistaken.

This Court will assume that the District Court in California was a court of general jurisdiction.

Now, at common law, in declaring upon judgments of courts of general jurisdiction, it was and is only necessary for it to appear that the court is a court of general jurisdiction, whereas, with respect to pleading judgments of courts of special jurisdiction, it was necessary to aver and prove facts showing jurisdiction over the person and subject matter.

Wheeler *v.* Raymond, 8 Cow., 311.

The Code left untouched the old rule at common law with respect to pleading on judgments of courts of general jurisdiction. This rule was, and is, as follows:

Pleading on a Judgment of Courts of General Jurisdiction.

In United States Courts, when pleading on a judgment of a court of general jurisdiction, it is only necessary to show that the court was of general jurisdiction. The United States courts will take notice of the jurisdiction of such courts of record. It is otherwise as to courts of special jurisdiction.

Pennington *v.* Gibson, 16 How., 65.

At common law, in pleading in a declaration on a judgment of a court of general jurisdiction, whether foreign or domestic, it was only necessary to aver what the court was, the rendition of the judgment within the jurisdiction of the court, and that it was unpaid (see forms of declarations in 2 Chitty on Pleading, pages 482 to 487, 244 and Notes).

1 Chitty on Pleading, pages 370 and 371, and Notes;
Wheeler *v.* Raymond, 8 Cow., 311;
Shumway *v.* Stillman, 4 Cow., 292.

In an action on a State judgment, brought in a court of the United States, if the declaration or complaint shows that the court was a court of general jurisdiction, it is not necessary to aver service of process, &c.

The Court will take judicial notice of the laws of other states and of courts of record of such states. If the judgment was rendered without jurisdiction, that is a matter of defense.

Pennington *v.* Gibson, 16 How. (U. S.), 65;
Tenney *v.* Townsend, 9 Blatchford, 274;
See also Stewart *v.* Stewart, 27 West Va., 167;

Pringle *v.* Woolworth, 90 N. Y., 502; Am. and Eng. Enc. of Law, Title, "Judgment," page 148 U.

A sufficient complaint on a judgment of a sister State would be to set forth the name of the court, the place where the court was held, the names of the parties, the date of the judgment and its amount.

Andrews *v.* Flack, 6 So. Rep. (Alabama), 907.

In Pennington v. *Gibson, 16 How., 65, is shown clearly what would be a good declaration in a United States court in a suit brought upon a judgment of a State court.*

Gibson had recovered a judgment in New York in an equity suit, which awarded him simply the payment of money. He brought suit on this decree or judgment in the Circuit Court of Maryland.

The declaration was this and only this:

> "That at a General Term of the Supreme Court in equity of the State of New York, one of the United States of America, held at the Court House, in the Village of Cooperstown, in the County of Otsego, in the State of New York, on the first Monday in November, in the year 1848, present, William H. Shankland (and others) Justices,
>
> It was ordered, adjudged and decreed by the said court in a certain suit therein pending, wherein the said Lyman Gibson was complainant and the said Josias Pennington (and others) were defendants, that the said Lyman Gibson recover against the said Josias Pennington, and that the said Josias Pennington pay to the said William Gibson the amount of the consideration money paid by the said Lyman Gibson to a certain Samuel Boyer, as agent and attorney of the said Josias Pennington, as should appear by the several endorsements upon the contract mentioned and set forth in the bill of complaint and produced and proved as an exhibit in

> said suit, with interest on the several payments and endorsements respectively, amounting in the aggregate, on the 25th day of November, 1848, to the sum of $5,473.18, and also that the said Josias Pennington pay to the said complainant his costs in said suit, which were taxed at the sum of $661.68, as by the said decree, duly signed and enrolled at a Special Term of the Supreme Court in equity, aforesaid, held on the 30th day of April, in the year 1849, at the Village of Bath, in the County of Steuben, in the State of New York, and now remaining in the office of the Clerk of Steuben County, aforesaid, will, on reference, appear."

It will be observed that this declaration *did not state that the court was a court of general jurisdiction*, nor did it state that *process* was served upon the *defendant* in said suit.

In fact, the declaration was briefly that in the Supreme Court in equity, of New York State, held at Cooperstown, New York, in November, 1848, Gibson secured a judgment against Pennington for $5,473.18, and for costs, $661.68; that the decree was entered April 30, 1849, at Bath, New York State, and is now of record.

A demurrer was interposed to this declaration. The main question raised by the demurrer was that there was no averment to show that the court had jurisdiction. The Supreme Court of the United States held that it would take judicial notice of the fact that the Supreme Court of New York in equity was a court of general jurisdiction; that the presumption would be in favor of the jurisdiction of such a court; that the court would take judicial notice of the laws of the several States; and that "if an exception to their power or jurisdiction is designated, it must be averred and shown as matter of defense. Such is the general rule as laid down by Chitty, Vol. I, page 442; so in the case of Shumway *v.* Stillman, in 4 Cow., 296."

The Supreme Court overruled the demurrer and held the declaration good.

So, likewise, the complainant in this suit could have alleged as follows:

> "That at a Term of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, at said City of San Francisco, on the 18th day of November, 1873, it was ordered, adjudged and decreed by the said court in a certain action therein pending, wherein the said Henry P. Wakelee was plaintiff and the said Erwin Davis was defendant, that the said Henry P. Wakelee recover against the said Erwin Davis, and that the said Erwin Davis pay to the said Henry P. Wakelee the amount of certain promissory notes, produced and proved as exhibits in said suit, with interest thereon, amounting in the aggregate, on said 18th day of November, 1873, to $22,760.26, with interest thereon, at the rate of 7% per annum, from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of $49 00, amounting in all to $22,809.26, as by the judgment entered at a term of said court, held on said 18th day of November, 1873, at said City of San Francisco, aforesaid, and now remaining in the office of the clerk of said court, will, on reference, appear.
>
> That said judgment has been duly assigned to the plaintiff."

This having been alleged, the court would have presumed that the District Court was a court of general jurisdiction; would have presumed that the judgment was properly entered and recovered. The declaration would not have been demurrable and the objection to the jurisdiction of the court could have only been taken by answer.

It appears, therefore, that there was an adequate remedy at law.

If a cause of action can be thus stated without resort to fictitious pleadings, a cause of action

which is not demurrable, one which Davis would have to answer and set up defect of jurisdiction, it is clear that complainant after answer would then be in one of two positions—if she could not reply, she could give in evidence the facts constituting the estoppels in order to validate the judgment; or, if she could reply, she could reply the estoppels and thus introduce the facts in evidence.

We shall cite subsequently cases to show that estoppels can be given in evidence under these circumstances.

This being the case, a complete cause of action at law could be stated at the outset and plaintiff in such an action could avail herself of the estoppels.

This rule of pleading on judgments of higher courts is well settled in all the states.

The better rule is that in pleading a judgment of a court of record of another State, the jurisdiction of the court to render it need not be alleged.

Gunn *v.* Howell, 27 Ala., 663;
Meredith *v.* Santa Clara, 56 Cal., 178;
Bruckman *v.* Taussing, 7 Colo., 561;
Butcher *v.* Bank, 2 Kansas, 70;
Williams *v.* Preston, 3 J. J. Marsh, (Ky.), 600;
Bissell *v.* Wheelock, 11 Cush., 277;
Stephens *v.* Roby, 27 Miss., 744;
Halstead *v.* Black, 17 Abb. Pr., 227;
Reed *v.* Boyd, 13 Texas, 241.

We have thus seen that the New York Code does not apply in New York State to pleading on judgments like the one at bar and that the entire framework of the complainant's bill and of the complainant's suit fails.

The complainant seemed to realize this, for, in her brief which she submitted to this Court when she made a motion to dismiss this appeal, she stated (pages 40 to 42 of said brief), that jurisdiction in equity in the United States courts depends not on

State laws as to adequacy of remedy, but on the jurisdiction of courts of equity as they were in England at the adoption of the Constitution, citing

Boyce *v.* Grundy, 3 Peters, 210;
United States *v.* Howland, 4 Wheat., 108;
Robinson *v.* Campbell, 3 Wheat., 212;
Bennett *v.* Butterworth, 11 How., 673;
Thompson *v.* The Railroad, 6 Wall., 134.

She also claimed that the practice of the State courts does not control the United States courts as to causes of action in law and in equity, citing,

New Orleans *v.* Louisiana, 129 U. S., 45;
Scott *v.* Neely, 140 U. S., 106;
Broderick Will Case, 21 Wall., 520;
Holland *v.* Challen, 110 U. S., 15.

She also claimed that the adequate remedy at law is that which existed before the Constitution, citing

McConihay *v.* Wright, 121 U. S., 201.

This claim of complainant puts her in the RIDICULOUS position of averring in the bill that, inasmuch as the *Code applies* to pleading on a judgment, she *cannot* plead at law, and *for this reason* comes into equity, as she has no *adequate* remedy at law, and then, to sustain an *erroneous* decree, she withdraws from the bill the *only* prop which she erected to sustain it.

We contend, under this point—

1. That the Code of New York applies only to pleading judgments of courts of special jurisdiction.

2. That both in New York State and United States courts, in pleading on a judgment of a higher court, it is only necessary to allege the name of the

court, the place where it was held, the names of the parties, the date and amount of the judgment sued on.

(*a*). This is true in New York State courts, because the old common law rule is not repealed by the Code.

(*b*). This is true in United States courts in New York State, because the State rules in no cases apply and the old Common Law rules do apply.

Hence, it is clear that complainant could have framed her declaration or complaint, which would be absolutely good on its face, whether she sued in the courts of the State of New York, or the courts of the United States located therein.

(2). THERE WAS AN ADEQUATE REMEDY AT LAW, BECAUSE THE COMPLAINANT COULD HAVE SET OUT, IN A COMPLAINT OR DECLARATION AT LAW, ALL OF THE FACTS, NAMELY, THE JUDGMENT, ITS INVALIDITY, THE FACTS CONCERNING THE ESTOPPELS, &C., AND COULD HAVE DEMANDED JUDGMENT. THIS WOULD NOT HAVE BEEN DEMURRABLE.

The United States courts and the courts of New York have a similar practice, so far as may be, as provided by United States Revised Statutes, 914.

The Code of New York, at Section 481, provides as follows:

> "The complaint must contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition."

Now, complainant, in setting out the facts, could have stated them all fully in an action at law, including the facts claimed to constitute the estoppel. This would not have been demurrable.

See following decisions in Code States:

Maxwell *v.* Longenecker, 89 Ill., 102;
82 Ill., 308;
Clauser *v.* Jones, 100 Ind., 123;
Ransom *v.* Stanberry, 22 Iowa, 334.

And at common law this mode of pleading is not without authority. "The matter operating as an estoppel may appear on the face of the declaration."

1 Chitty on Pleading, page 603 and Note E.

Matter of estoppel should be specifically pleaded.

1 Chitty on Pleading, page 509, Note R.

The general requisites or qualities of a declaration are that it contains a statement of all the facts necessary in point of law to sustain the action.

1 Chitty on Pleading, page 244:
Coke on Littleton, 303 A., Plowd., 84, 122.

The complainant relies on the case of the Welland Canal Co. *v.* Hathaway, 8 Wend., 481, and the cases which simply follow it, namely: Hostler *v.* Hays, 3 Cal., 302; Bank *v.* Wollaston, 3 Harrington, 90, as holding that, under the old common law system, estoppels could not be pleaded.

In subsequent cases, however, such as Gaylord *v.* Van Loan, 15 Wend., 308, it is held that the claim that estoppels cannot be pleaded is not well founded.

See also

Insurance Company *v.* Bloodgood, 4 Wend., 652.
People *v.* Bristol Road, 23 Wend., 222.

We will examine more closely into the question whether the case of Welland Canal Company *v.* Hathaway, 8 Wend., 481, is in point.

That was an action of *assumpsit* brought by the Welland Canal Co. against Hathaway to recover an overpayment made to him as a contractor on the plaintiff's canal. The declaration contained the common money counts, and the plea was the general issue. In support of the action the plaintiff gave in evidence a receipt signed by defendant in these words: "Received from William Hamilton Merritt, agent W. C. C., the sum of $250.00 currency, April 7, 1827."

The jury found a special verdict, and the only question presented thereby was whether the plaintiff was a body corporate.

Nelson, J. (delivering the opinion of the Court), says, p. 481:

> "That the plaintiffs must, at the trial, prove themselves duly incorporated by competent authority on the plea of the general issue, is not to be contested at this day in this court (19 Johns., 300; 1 Wend., 555). This is conceded by the counsel for the plaintiffs, but it is contended that the receipt of the defendant and his contract with the agent of the Company ought to estop him from denying their legal existence." * * *
>
> P. 483: "The acts set up in this case, it is not pretended, constitute a technical estoppel, which can only be by deed or matter of record, but it is said they should operate by way of estoppel—an estoppel *in pais*. Such estoppels cannot be pleaded, but are given in evidence to the Court and jury, and may operate as effectually as a technical estoppel under the direction of the Court."

It must be observed that this was said in the year 1832, when the *common law system* of pleading was in full vogue, and sixteen years before the passage of the Code of Procedure in 1848.

But, even under the common law system, this

assertion was never true in the breadth in which it is stated in 8 Wendell. This is clearly shown in the case of *Gaylord* v. *Van Loan*, 15 Wend., 308. The action was *assumpsit* on a promissory note. The defendant pleaded the Statute of Limitations, and the plaintiff replied a promise by defendant not to plead the statute, which promise was made before the statute had run. Nelson, J., the same Judge who used the language quoted from 8 Wendell, delivered the opinion in this case, and here is his language, p. 312: "*Now, it is difficult to comprehend* why the party may not avail himself of matter that *operates as a conclusive estoppel* in pais *by way of pleading, as well as a mere technical estoppel of record or deed. There is no distinction in principle or effect.* The former constitutes a legal bar in the way of a plea, or answer by way of replication, and is just as decisive upon the rights of the parties, when established by proof, as the latter." * * *

> "In truth the distinction, though we find it *sometimes stated in general terms that the one is available only as evidence while the other is by plea, does not appear to be very thoroughly determined.*"

See also *Ins. Co.* v. *Bloodgood*, 4 Wend., 652, cited by Nelson, J., in last case, p. 313.

What becomes of the rule as stated by Nelson, J., in 8 Wend. in the light of these later decisions?

In counsel's supplemental brief before this Court on the recent motion to dismiss the appeal and affirm the judgment he cited the cases of

(1.) *Sampson* v. *Schafer*, 3 Cal., 196;
(2). *Lites* v. *Addison*, 27 So. Car., 226;
(3). *McClung* v. *Bergfield*, 4 Minn., 148;
(4). *Coleman* v. *Pearce*, impleaded, 26 Minn., 123;
(5). *Cornhauser* v. *Roberts* and ano., 75 Wis., 554,

to the effect that estoppels could not be pleaded.

None of these cases are in point.

(1). The first case was an action for rent on an express contract. Plaintiff failed to prove the contract. The facts showed that possession was adverse to plaintiff. It has no bearing on the question of pleading estoppel *in pais*.

(2). The second case was an action brought against the defendant on a note made by him, payable one day after date to one Taylor. In the course of a business transaction Taylor proposed to transfer the note to plaintiff, and plaintiff, after interviewing defendant, and having the assurance of the defendant that the note was good, and that he intended to pay it, accepted the note for value. The defendant set up a defense that there was no consideration for the note. The Court awarded judgment in favor of the plaintiff, holding that the plaintiff *need not* plead the estoppel to maintain his cause of action. This case does not support counsel's contention.

(3). The third case was an action in replevin to recover goods taken under execution issued against one L. The plaintiff claimed title under a general assignment dated September 20th, 1858, which was offered in evidence. Defendant offered in evidence the record of a general assignment of the same property to one F., dated November 27th, 1857, to disprove plaintiff's title. It was rejected because not alleged in the pleading.

(4). In the fourth case the plaintiff sent to the defendant O'Neill, wheat to be sold on commission when ordered. Before the order for sale, defendant became a partner of O'Neill's. Notice was given plaintiff, both by the firm and by P. personally, and the plaintiff was given to understand that

his account had been transferred to the firm. Bills were rendered to him in firm name. The plaintiff looked to the firm as his agent. Subsequently O'Neill became insolvent and converted the goods. Action was brought against both as partners for conversion. Held, that they were estopped to deny the partnership, but that the acts constituting the estoppel *need* not be pleaded.

(5). The fifth case was one in which plaintiff sold goods to one D., who represented himself to be the partner of R. The goods were delivered to R. Plaintiff alleged in his complaint that the goods were sold to the defendants as copartners. It was held on good authority to be a good pleading, and the plaintiff recovered.

It will be seen that all of the cases cited by complainant's counsel are cases similar to those which we shall use as an illustration in our next point, and many of them are illustrations of the very point for which we shall contend, namely, that the complaint should plead the *ultimate facts*, or the facts in their legal effect, which, in the present case, would be equivalent to pleading the DUE entry of the judgment.

By Section 481 of the Code of Civil Procedure of New York, it is provided:

> "The complaint must contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition."

The one purpose, above all others, under the Code, was to make possible a recovery on the statement of the *actual facts*.

In the consideration of the question of pleading estoppels in a complaint in an action at law, this Court is in the same position it would be in if it were hearing a demurrer interposed by the defendant to a complaint so drawn.

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In the consideration of the question of pleading estoppels in a complaint in an action at law, this Court is in the same position it would be in if it were hearing a demurrer interposed by the defendant to a complaint so drawn.

That our proposition may be the better understood we will restate it. We claim that the complainant can set out a good cause of action at law to recover the amount of the judgment of November 18, 187-, and that she can do it in the following manner. She can allege the facts as to the recovery of the judgment in California, and that by reason of a lack of personal service of Davis and want of appearance by him, said judgment in and by itself is void. She can then go further and set out all of the facts which she claims estop Davis from insisting upon the invalidity of said judgment, and can allege that by reason of said facts Davis is estopped from claiming said judgment to be void, and that, therefore, in law said judgment is to be treated as a valid judgment against Davis. She can then demand judgment for the amount of said judgment, with interest.

We contend that, assuming the facts alleged as such actually constitute an estoppel, such a complaint would not be demurrable, and that the plaintiff would be entitled, on proof of the allegations in such a complaint, to recover the amount of said judgment and interest.

What possible objection can there be to such a method of pleading?

The only answer vouchsafed by counsel is that he can find no authority for pleading an estoppel in a complaint in an action at law. The objection is, therefore, purely a negative one.

Even if we assume this lack of authority, it is not conclusive. We do not believe for a moment that this limitation to pleading estoppels exists to day under our Code rule of pleading.

That such is not the law in many States where Code pleading has been adopted, the following authorities will show:

> "The position . . . that the variance may be disregarded because an estoppel in *pais* need not be pleaded is incorrect. . . .

The Code requires the *facts* constituting the *cause of action* or ground of defense whatever they may be, to be succinctly, and clearly stated in the pleading."

Gill v. *Rice*, 13 Wis., 613.

"It appears well settled by the decisions of this Court that estoppels must be pleaded."

Warder, et al., v. *Baldwin*, 51 Wis., 450, at 459.

"Evidence of the matter of fact essential to the support of the action cannot be heard unless the complaint or other proper pleading contains an averment of such essential matter of fact."

Maynerd v. *Firemen's Fund Ins. Co.*, 34 Cal., 481.

In the case of *Davis* v. *Davis*, 26 Cal., 23 (the action being in ejectment), at page 39, the Court says:

"And it is but just, and is in accordance with the rules of pleading in equity cases, that the party relying upon the equitable estoppel in *pais* should inform the adverse party of the *cause of action, or defense* which he will be obliged to meet. To do this he must plead it with the same boldness and particularity as is required in cases involving like subjects of inquiry in suits of equity."

In *Ind. District of Burlington*, v. *Merchants' National Bank*, 68 Iowa, 343, at 348.

"It is well settled that the estoppel should be pleaded."

See also *Folsam* v. *Star Union Line*, 54 Iowa, 490, at p. 498;
Phillips v. *Van Schaick*, 37 Iowa, 229, at 236;

In *Gooding* v. *Underwood*, 89 Mich., 187, at 190.

"The estoppel . . . cannot be taken advantage of, either as a ground of recovery or a defense unless pleaded."

See also *Pearson* v. *Hardin*, 95 Mich., 360;
Dale v. *Turner*, 34 Mich., 405.

In *Palmer* v. *Hayes*, 112 Ind., 289, the Court says:

"If facts constituting an estoppel exist they must be pleaded."

Peters v. *Griffee*, 108 Ind., 121.

"No such facts appear in the complaint."

In *Greenup, et al.*, v. *Crooks, et al.*, 50 Ind., 410, at 417.

"It is settled that all estoppels in *pais* must be pleaded."

See also *Robbins* v. *Magee, et al.*, 76 Ind., 381;
Sims v. *The City of Frankfort*, 79 Ind., 446, at 452;
City of Delphi v. *Startzman*, 104 Ind., 343;
Clauser v. *Jones*, 100 Ind., 123;
Bray v. *Marshal*, 75 Mo., 327;
Heirs of Wood v. *Nichols*, 33 La., Ann., 747;
Texas Bank Co. v. *Hutchins*, 53 Texas, 61.

In the case of *Maxwell* v. *Longenecker, et al.*, 89 Ill., 102, this question of pleading an estoppel in a complaint is considered. The case had been in the appellate tribunal once before, and is reported in 82 Ill., 308.

The Court says:

> "We discover nothing in the present record, in respect to the terms upon which the $8-17. of money belonging to W. & W. was held by appellant, materially differing from what is there (in 82 Ill., 308) disclosed. The evidence clearly shows that this money was to be paid out on the order of W. & W., and that it was so paid out. There is no pretense that appellant was indebted to appellees for work done by them for him, nor is there any pretense that any part of the money held by the appellant was set apart by agreement with W. & W. for appellees, or that they ever ordered him to pay appellees.
>
> *If it should be conceded that the evidence shows that appellant, notwithstanding the fact was otherwise, represented that he held the money to pay appellees, and promised to do so upon their completing the work, and that they, relying upon this representation and promise, did complete the work, and we should thereupon hold that appellant is estopped to deny the truth of what he represented, and must make good his promise, there still can be no recovery under this declaration, for in no count are there averments warranting the admission of such evidence.*
>
> *To recover on such a state of facts, if a recovery thereon should be had, there should have been a special count averring that.*"

In *Clauser* against *Jones*, 100 Ind., 123, a similar question was considered.

The Court said:

> "The demurrer in the present case admits that there was no obstruction of a natural water course, and that the obstruction complained of was of an artificial outlet made by license, which license was granted without consideration, and afterwards revoked. *If there was any act done or money expended on the faith of the license, the effect of which would be to prevent the revocation of such license to make an artificial outlet, it ought to be shown by some appropriate pleading.*

> The allegation in the complaint, in reference to a natural water course, that the plaintiff, with the knowledge of the defendant, expended $1,000 in tile drains, leading from all directions into such water course on the plaintiff's own land, does not show that the defendant is estopped from revoking the parol license granted without consideration. *If the complaint had averred a license, and expenses incurred on the faith of the license, a different matter would be presented.*"

The foregoing cases show conclusively, not only may estoppels in *pais* be pleaded, but that it is necessary to plead them in many States, under which the Code system of pleading prevails. This question does not seem to have ever been passed upon directly by the Court in New York, but we have already shown that the rule laid down in *Welland Canal Co.* against *Hathaway*, was afterwards qualified by the Judge who wrote the opinion, and its force practically nullified.

We contend also for this broad and sweeping proposition and its applicability to the present case, namely, that where a defendant in an action at law is estopped to deny the existence and truth of a fact or facts, then that fact or those facts, for all purposes of law and legal redress, exist and are true, and may be averred to exist and to be true in a complaint or declaration or other pleading.

(3). COMPLAINANT HAD AN ADEQUATE REMEDY AT LAW, BECAUSE HE COULD HAVE PLEADED AS LEGALLY TRUE WHATEVER HE COULD HAVE SUBSTANTIATED BY PROOF OF THE FACTS CONSTITUTING THE ESTOPPELS. THIS WOULD NOT HAVE BEEN PERJURY.

Facts can always be pleaded according to their legal effect or can be set forth in full.

> Bliss on Code Pleading, Sec. 158, page 259, and cases cited.

In Bliss on Code Pleading, pages 254, 255, a pertinent illustration is cited, as follows:

Suppose A converts and sells goods belonging to B. B can waive the tort and can sue A for the value of goods as upon a sale. The theory of a sale is a legal fiction. Now, in suing, B can plead either of two ways.

1. He could allege a sale, a promise to pay the value, and the refusal to pay. This would be legally true and would be proved by proving the facts concerning the conversion.

Memorandum: So in the present case the complainant can allege generally, under the common law, that the judgment was recovered within the jurisdiction of the California court, a court of general jurisdiction, or can allege that it was duly recovered under the Code. These would likewise be legal fictions, but would be proved true by evidence of the facts constituting the estoppels.

2. B, also, if he chose, could state all the facts as they actually occurred, and in this way would not plead fictitiously, and could still recover as for a sale.

Memorandum: So likewise in this case could the complainant at law state the recovery of the judgment, its invalidity, the facts constituting the estoppel, and could demand judgment.

By pleading facts legally true, complainant could have stated at law a cause of action in either of two ways:

(*A*). He could have pleaded all jurisdictional facts necessary under the Code or at common law.

(*B*). He could have pleaded that the judgment was duly recovered under the Code, if the Code applies.

(*a*). If Davis is estopped to deny that the judgment was valid, the complainant could have

pleaded all jurisdictional facts necessary at common law or under the Code to be pleaded when suit is brought upon a judgment.

The reason is that a man may plead as legally true what can be shown by evidence in effect to be true.

See Cuthbertson *v.* Irving, 4 H. & N., 752; 6 H. & N., 135;
Smith's Leading Cases, 9th American Edition of the 9th English Edition, page 202;
Caldwell *v.* Auger, 4 Minn., 217;
Coleman *v.* Pearce, 26 Minn., 123;
Griswold *v.* Haven, 25 N. Y., 595;
Fall River Bank *v.* Bennington, 97 Mass., 498;
Casco Bank *v.* Keene, 53 Me., 104;
Philadelphia Co. *v.* Howard, 13 How., 307.

These cases show that at common law the plaintiff always could aver the existence of the fact in his declaration, and, if the fact was traversed, prove it by proving, not the fact as alleged, but the facts estopping the defendant from denying the truth of the fact alleged.

If it were necessary in all of the cases cited to go to equity because a complainant could not *truthfully* allege such facts, then, and only then, would complainant's present bill be well brought.

Hence, if it were necessary for the complainant to plead jurisdictional facts, he might have alleged that the judgment was recovered after personal service upon Davis in California, of the summons. He might have alleged any other fact necessary to show the jurisdiction of the court, or the jurisdiction of the court over the person of Davis. While these facts would not be actually true, they would be legally true, and would be established if denied or traversed, not by proving the fact, but by show-

ing the estoppels. Of course, such a complaint in no way could be demurrable.

(*b*). If the Code is held to apply to pleading on such a judgment as this, then, all the more, could the complainant have pleaded that the judgment was duly recovered. This would likewise be legally true, provided Davis were estopped to deny the fact.

It is conceded by the bill that a complaint alleging that the judgment was duly recovered would not be demurrable.

If the defendant should deny this, then the complainant could prove the facts constituting the estoppels to establish his cause of action.

See Philadelphia Co. *v.* Howard, 13 Howard, 307;
Kirk *v.* Hamilton, 102 U. S., 68;
Dickerson *v.* Colgrove, 100 U. S., 578;
Shelton *v.* Alcox, 11 Conn., 240;
Doe *v.* Rosser, 3 East., 15.

The effect of admitting in evidence the estoppels will prevent defendant from proving the judgment was not duly recovered.

See
Martin *v.* Gilbert, 119 N. Y., 298;
Griswold *v.* Haven, 25 N. Y., 595;
Coleman *v.* Pearce, 26 Min., 123.

If the complaint states that the judgment was duly recovered, the complainant can swear to it. Although false in fact, it is true in law. It would not be perjury.

A party can plead facts according to their legal effect.

Bliss on Code Pleading, 2d Ed., Sec. 158;
Brown *v.* Champlin, 66 N. Y., 214;
Bennett *v.* Judson, 21 N. Y., 238;

Caldwell *v.* Auger, 4 Minn., 217;
Coleman *v.* Pearce, 26 Minn., 123;
English Notes to Spencer's Case, pages 201-202;
9th American Ed. from 9th English Ed. of Smith's Leading Cases;
Cuthbertson *v.* Irving, 4 H. & N., page 752; and on Appeal, 6 H. & N., page 135;
Griswold *v.* Haven, 25 N. Y., 595;

See also

Bennett *v.* Judson, 21 N. Y., 238;
McGoldrick *v.* Willits, 52 N. Y., 612;
Abbott *v.* Blossom, 66 Barb., 353.

Illustration: Suppose that a man, before advancing money on a note, applies to the maker as to whether the signature is his, and that, although the signature is a forgery, the person interrogated admits it to be his. Now, in a suit on the note, the complaint would properly state that the defendant made the note. This would not be actually true, but would be legally true; and, to prove this allegation, the evidence would simply be the defendant's admission of his signature.

But, according to complainant, it would be necessary to go into a court of equity to enjoin the maker from pleading, in some future action at law, that he did not make the note. This, of course, is absurd; but this is just what the complainant does in this action. He desires to come into equity, as he says, because he cannot *truthfully* allege that judgment was *duly* recovered.

General Considerations on the Subject of Pleading.

We have maintained, and are sustained by the authorities, that the New York Code, Section 532,

does not, and cannot, regulate pleading on judgments of courts of general jurisdiction.

The complainant, however, to fortify her bill and her position, makes the following argument. She says that Section 138 of the Code of 1847, re-enacted as Section 161 of the Code of 1849, read as follows:

> "In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary," &c.

Now, she says that the language shows that the words, "or officer of special jurisdiction," are parenthetical, and that the word "court" is not limited by the words, "of special jurisdiction," and must mean any court.

When the new Code was enacted in 1877, the old section became Section 532; the only change was to drop the comma after the word "court."

Now, she says that, upon a revision of a statute, a mere unsubstantial change of phraseology will not change the rule of law.

McDonald *v.* Hovey, 110 U. S., 619.

Section 532 is simply a re-enactment of Section 161.

De Noble *v.* Lee, 47 N. Y. Sup. Reports, 372.

This being so, it covers all kinds of courts.

The answer to this argument is this:

The section of the Code states that it is not necessary to plead jurisdictional facts. The words "duly recovered" may be used instead. Now, the statute was intended to change something to modify the rules of the common law, but it was *never necessary* to plead jurisdictional facts with respect to judgments of higher courts. It was only necessary to do this when the judgment was that of a court of inferior jurisdiction. In construing a statute, we look to the evil that exists and the remedy desired, in order

to apprehend the present law. It is clear, therefore, that the rule with respect to pleading on judgments of inferior courts was the one that was changed; and similar changes have been made in other Code States.

See Bliss on Code Pleading, Section 303, and Note 1.

Another answer is this: That in suing Davis, who lives in New York, the complainant had the choice of two forums—the State courts and the United States courts. Now, even if she could not have pleaded in a State court, it is clear that the Code would not regulate the essentials of a cause of action in courts of the United States. We have seen this clearly from the authorities. Now, it does not appear from the bill that her contemplated action could not have been properly brought under the rules of the common law in the courts of the United States, notwithstanding the Code.

The complainant also argues that, inasmuch as the Code applies to all kinds of courts, but as it is doubtful whether the section applies to courts of *foreign* States, her remedy is doubtful, and hence, under the decisions in Drexel *v.* Berney, 122 U. S., 241, she is entitled to come into a court of equity. The answer to this is:

1. That the section of the Code referred to does not apply to courts of general jurisdiction.

2. It applies solely to courts of special jurisdiction.

3. Whether foreign judgments of courts of special jurisdiction can be pleaded as duly recovered under the Code is immaterial.

4. There is no doubt that this section of the Code applies to foreign judgments of inferior Courts.

Halstead *v.* Black, 17 Abb. Pr., 227.
Horton *v.* Shipherd, 14 Weekly Dig., 453.
McCorkle *v.* Herman, 22 St. Rep., 519-521.

To show that it is doubtful whether this section of the Code applies to pleading on foreign judgments, the complainant has cited certain cases. Among others:

Hollister *v.* Hollister, 10 How. Pr., 532.
McLaughlin *v.* Nichols, 13 Abb. Pr., 244.

These very cases cited by her conclusively show that this section of the Code, as *originally* passed and as it is *at present*, relates only to judgments of inferior courts. The first case cited was concerning the judgment *of a probate court of Vermont, a court of special jurisdiction*, and the second case was with respect to a foreign court of *inferior* jurisdiction, and in that case the Court said that the rule as to pleading on judgments of *superior* courts was clearly different; that the courts would take judicial notice of courts of record. The only question in these cases was whether that section of the Code allowed a party to plead that the judgment of an *inferior* foreign court was duly recovered.

Now, assuming that the Code applies, and that it would be lawful to plead that the judgment of a foreign court was duly recovered, but that complainant cannot do this *truthfully*, this affords no reason whatever for resorting to a court of equity.

We submit that complainant could truthfully allege that the judgment was duly recovered, and could swear to such a complaint. This would not be perjury.

The right to verify the pleading does not depend

upon the actual truth or falsity of the allegations therein contained. It depends simply and solely upon the *legal proof* thereof. If the pleading contains allegations which are known to the pleader to be false in fact, but which are true in law, there can be no perjury involved in the pleading, because nothing would be so absurd as for one court in a civil action to treat the allegations as true and for another court—a Criminal Court—to treat the same allegations as perjury. Now, no proposition of law is truer than that a party is entitled to *make any allegation in pleading which he can sustain by evidence.* This is but another way of stating the well-known rule that a party is entitled to plead facts according to their legal effect, than which no rule of pleading is better established.

> *Bliss on Code Pleadings*, 2d Ed., Sec. 158.
> Steph. Plead. (9th Am. Ed.), 389.

In *Brown* v. *Champlin et al.*, 66 N. Y., 214, at p. 219, Church, Ch. J., states the rule in these words:

> "It is unnecessary to set forth the evidence or the circumstances attending the transaction. It is sufficient to charge the legal effect of the transaction, contract or instrument in writing."

The case of *Bennett* v. *Judson*, 21 N. Y., 238, is a good illustration of this. There the defendant's agent, Davis, without the authority or knowledge of the defendant, had made false representations to induce plaintiff to exchange lands with the defendant. The defendant still retained the lands of plaintiff obtained in exchange. The plaintiff alleged in the complaint that the defendant made false representations, and this form of pleading was sustained.

> Comstock, Ch. J., says: "The complaint, in setting forth the cause of action, counts upon false representations made by the de

> fendant without any reference to the agent. *This mode of stating the case we think was proper under any system of pleading.* The same rule of law which imputes to the principal the fraud of the agent makes him answerable for the consequences, justifies the allegation in pleading that the principal himself committed the wrong."

Such pleading is purely fictitious, and yet was upheld by the New York Court of Appeals.

Applying the analogy of this case to the case at bar, it becomes perfectly clear that the plaintiff is entitled to allege in her action at law that the judgment of November 18th, 1873, was duly recovered. If the defendant is estopped from claiming that said judgment is invalid, it is for all legal purposes valid as against him, and the law makes him answerable as much as if the judgment had been duly rendered, and, therefore, the complainant is entitled to plead that such judgment was duly recovered. Such an allegation as we have shown can be sustained by offering estoppels in evidence, and such allegation is simply a statement of the legal effect of the evidence. As is well said by Maynard, J., in

> *Railroad Company* v. *Robinson*, 133 N. Y., 242, at page 246:
>
> "It is what is aptly described as a resultant fact or a conclusion of fact, and it is such facts * * * which should be alleged in the pleading. A statement is not to be deemed any less a statement of fact, because its ascertainment may depend upon principles of law applicable to various other facts and circumstances, and it has always been held good pleading to state facts according to their legal effect."
>
> Citing *Brown against Champlin et al.*, 66 N. Y., 214.
>
> See also the language of Hand, J., in *Boyce* v. *Brown*, 7 Barb., 80.

> An eminent writer says that "pleading is the formal mode of alleging that on the record which would be the support or the defense of the party in evidence."
>
> *1 Chitty on Pl.*, 199.

The question of pleading was very satisfactorily discussed in

> *Caldwell, Sheriff, &c.*, v. *Auger and ano.*, 4 Minn., 217.

Atwater, J., delivering the opinion of the Court, at page 222, says:

> "*The fact necessary here to be pleaded and proved is that Foret owned an interest in the boat*, and as to Herbert it is one and the same thing whether the defendant shows the allegations to be actually true, *or that the plaintiff himself at a certain time admitted it to be true, for the result is the same in the eye of the law.* It is in effect making the declaration of the plaintiff conclusive proof of the allegation in the answer and the pleading of the statement of Herbert in the answer would in fact be pleading proof of which, under any system, would be bad.
>
> *Herbert cannot object that the fiction of law (as it is termed by counsel) is pleaded, for as to him it is true.*"

In *Coleman* v. *Pearce*, 26 Minn., 123, the same rule of pleading was applied in favor of the plaintiff. He alleged possession by the defendant of certain grain. This allegation was denied. The Court, on authority of *Caldwell* v. *Auger*, *supra*, sustained the form of pleading, and held that plaintiff could allege a converson and prove it by facts estopping defendant from claiming the contrary.

In the case of *Cuthbertson* v. *Irving*, 4 H. and N., p. 752, the form of pleading in a declaration at common law, where plaintiff's title is by estoppel, is considerably discussed.

In that case the action was by the assignee of

the lessor against the lessee upon a covenant to repair made with the lessor and his heirs. The defendant, by one of his pleas, denied the assignment to the plaintiff, and alleged that the lessor had at the time of the demise no reversion, and that no reversion had vested in the plaintiff. Issue was joined upon this plea, and at the trial a special case was stated, by which it appeared that the lessor was without a legal title at the time of making the lease; that the lease did not in terms show the contrary, and that the assignment disclosed the want of title, but contained apt words to convey a reversion in fee. Judgment was given for the plaintiff.

Martin, B. (giving the opinion of the Court), at p. *758, says:

> "So long as the lessee continues in possession under the lease the law will not permit him to set up any defense founded upon the fact that the lessor '*nil habuet in tenementis*'; and upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee. *A pleading test may be applied. Had the plaintiff declared that Biglands (that is, plaintiff's assignor and defendant's lessor) was seized in fee, and demised to the defendant, and assigned his reversion to the plaintiff, the defendant could not effectually have traversed the assignment. Could he the seizin? The plaintiff would have made a prima facie case by showing a lease to the defendant and possession taken and enjoyed under it, and defendant could not have showed any other estate in Biglands. He must, therefore, have said Biglands 'nil habuit in tenementis.' We are of opinion that the law will not permit him to do so.*"

Again, on appeal in the Exchequer Chamber, 6 H. and N., p. 135, Wightman, J. (speaking for the Court), says, at p. 139:

> "The lessor in this case, being a mortgagor in possession at the time of granting the

lease, had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessor, is only by estoppel; and if the lessor assigns, as he can only assign that which he has, his assignee will either have a title by estoppel against the lessee or no title at all. *In this case if the plaintiff has declared in the old form, he would have stated the lessor seized in fee, which, according to the cases, might have been traversed, and if it had, and it had appeared upon the evidence that the lessor had no legal title or interest whatsoever in the premises, but only an equity of redemption, the question is, how ought the issue upon the traverse to be found. The answer is for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a legal tittle as would warrant the lease; and as no other legal title or interest is shown to have been in the lessor, it must be taken as against the lessee by estoppel that the lessor had an estate in fee.*"

The case arose subsequent to the Procedure Act of 1852 in England, and by declaring "in the old form" is meant by the common law system.

Here it is distinctly stated that the plaintiff could aver seizin in his assignor, and the assignment to himself; that the defendant might traverse the seizin, and that the seizin would be established not by proving it as a fact, but by showing defendant estopped to deny it.

That, we contend, is just what complainant can do in her contemplated action at law.

This matter is considered by the learned editors of the ninth English edition of Smith's leading cases, and their result announced in the following terms (9th Am. Ed. of the 9th Eng. Ed., p. 202): "An estoppel does not necessarily involve a falsehood. On the contrary, facts are ascertained through the medium of estoppel, without reference to the question whether really true or false; and it would be sheer fallacy to assume that a fact established by estoppel has, therefore, no real existence."

The case of *Griswold* v. *Haven et al.*, 25 N. Y., p. 595, is almost identical with the case of *Coleman* v. *Pearce*, 26 Minn., 123, and may be examined with profit on the question of pleading and proof.

In *Fall River Bank* v. *Buffington*, 97 Mass., 498, the plaintiff, as endorsee of a promissory note, sued defendant as endorser. It appeared at the trial that the endorsement of the defendant's name was a forgery, but there was evidence tending to show that before the notes were due, but after they had been discounted at the bank, the cashier showed them to the defendant for the purpose of ascertaining if what purported to be his signature was genuine, and learning from him that it was, took no steps to collect the notes from the person who procured them to be discounted, as he otherwise would have done if he had not relied on the defendant's assurances.

Judge Hoar (delivering the opinion of the Court), says, at p. 499, in discussing the rule of damages:

> "The action is not an action on the case for deceit; it is an action upon a promissory note. The plaintiff alleged that the defendant endorsed the note in suit, and instead of proving the fact affirmatively, proved, as by the rules of law they were entitled to do, that the defendant is estopped to deny that the endorsement is obligatory upon him."

If the claim of counsel is correct, the plaintiff in the foregoing case would have been driven to a court of equity to avail himself of the estoppel. He would claim that in an action at law in order to recover against Buffington, he would have to allege that Buffiington endorsed the note, and as he could not *truthfully* allege in the complaint in an action at law, that Buffington endorsed the note, he would, therefore, according to counsel, be without remedy, and would be forced to ask a court of equity to restrain Buffington from setting up in an action at law on said note the claim that he did not endorse

it. The mere statement of such proposition is its best refutation.

Suppose, by way of further illustration, that B should apply to A to sell him goods, and should represent that he was a partner with C under the firm name of B & C As a matter of fact B is not a partner of C's. A refuses to sell B unless C will state to him that he is a partner with B, and accordingly A asks C whether he is a partner, and C represents that he is, and that A can safely sell. A sells goods and demands payment which is refused, and he is informed that C never was a partner with B, would counsel maintain that A could not sue B & C, and aver in his complaint that B & C were partners under the firm name of B & C, and that he sold and delivered goods to said partnership and state their value, and ask for judgment for the amount thereof. It seems too absurd to argue for a moment that A would not have an adequate remedy in an action so framed. Yet, according to the contention of the plaintiff A would be driven into a court of equity because he could not *truthfully* assert a partnership between B and C; and without asserting such partnership he could not have an action against B & C as partners (see Coleman *v.* Pearce, 26 Minn., 126, and Cornhauser *v.* Roberts, 75 Wis., 354.)

There is a long list of cases in New York State beginning with

North River Bank v. *Aymer*, 3 Hill, 262,

in which an agent does an act which, compared with the words of the agent's power, is warranted by the terms used, but which, owing to some extrinsic fact known only to the agent himself, is without authority, and yet the principal is bound by that agent, as an agent, as much as if the agent had been actually authorized to do the particular act.

The principal in such cases is said to be estopped to deny the authority of the agent to do the particular act. Now, we ask whether it would not be absurd to suppose that a party who has dealt with an agent that has done such an act, because he chances to learn the want of authority before suit, resort to a court of equity to avail himself of the estoppel because forsooth if he sues the principal and alleges that he did the act, or alleges that the principal did by his duly authorized agent, he alleges what is actually not true, although it is legally true. The result of counsel's position would be that in every case where the plaintiff ascertains the truth before suit he could not sue at law, because he would have to make the fictitious allegation in pleading in order to avail himself of the estoppels in evidence. Counsel's position briefly reduces itself to this bald proposition, that in order to avail himself of estoppels in evidence plaintiff in an action at law would have to make the fictitious allegation in pleading, and that equity, in order to relieve him from making such fictitious allegation, will regard him as having no remedy at law, or at least an inadequate remedy, and will afford him equitable relief.

That equity does not have such devotion to truth is plainly evidenced by the comparative infrequency with which it is called upon to assist in contemplated actions at law.

See *Casco Bk.* v. *Keene*, 53 Maine, 104, where, though the pleadings are not stated, it is clear from the nature of the action (*assumpsit*) that the plaintiff alleged the making of the note sued on by defendant, the defendant denied the making, and the plaintiff proved his case, not by showing that defendant made the note, but by showing that the defendant was estopped to deny that he made the note.

One of the most valuable cases, however, on the

question is *The Phila., Wash. and Balt. R. R. Co.* v. *Howard*, 13 How., 307.

That was an action of covenant brought by Howard against the Railroad Company. The plea was *non est factum*. Under the issue the question was whether the contract sued on was or was not the contract of defendant, and that turned upon the further question whether the seal of defendant was or was not affixed by authority of defendant. Plaintiff was allowed to show that defendant had relied upon this contract as the contract of defendant, in order to defeat a prior suit brought by the plaintiff. The defendant claimed that the seal was affixed without authority, and that in the former action a mistake had been made in admitting said contract to have been duly sealed. The Court held the defendant estopped to show the mistake or deny the validity of the sealing.

Curtis, J., says, in speaking of an exception to the charge, at p. 333:

> "It is objected that this instruction applied the doctrine of estoppel where the matter of estoppel had not been relied on in pleading. The rules on this subject are well settled. If the party has the opportunity to plead an estoppel, and voluntarily omits to do so, and denies or takes issue of the fact, he thus waives the estoppel and commits the matter to the jury who are to find the truth, but if he had no opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence on the trial under any issue which involves the fact, and both the Court and the jury are bound thereby."
>
> * * * * * *
>
> "The plea of *non est factum* readily concludes to the contrary, and so the plaintiff has no opportunity to reply specially to any new matter of fact. He can only join the issue tendered, and if he were prevented from having the benefit of an estoppel, because he has not pleaded it, it would follow that the plaintiff could never have the benefit of an estoppel where the defendant pleads

> the general issue, for in no such case can he plead it. This was clearly pointed out in *Trevivian* v. *Lawrence*, 1 Salk, 276, where the Court says that 'when the plaintiff's title is by estoppel and the defendant pleads the general issue, the jury are bound by the estoppel.' And it is in this way that the numerous cases of estoppel in *pais*, which are in the recent books of report, have almost always been presented."

Here it will be seen that it never occurred to the Court to question that plaintiff could allege in his declaration that the deed was the deed of the defendant, and establish the truth of said assertion by showing, not that *in fact* and *in truth* said deed was executed by defendant, but by showing facts estopping defendant from denying the truth of the allegation that it was defendant's deed.

The case in 13 How., 307 (*supra*), is the precise authority for our present position. If the plaintiff alleges that the judgment of November 18th, 1873, was duly recovered, and defendant denies this, of course there can be no opportunity for plaintiff to reply to the facts constituting the estoppel, and she will be in the same position as the plaintiff in the case cited.

> In *Kirk* v. *Hamilton*, 102 U. S., 68, and *Dickerson* v. *Colgrove*, 100 U. S., 578,

the same rule was enforced. Each action was one in ejectment. The defendant pleaded the general issue. Of course, under this plea, two issues were raised. The plaintiff was bound to allege and prove (1) title in himself, and (2) right to immediate possession.

In each of these cases the plaintiff's title was not disputed, but in order to prevent a recovery and to show the plaintiff not entitled to possession, the defendant was permitted to introduce evidence which showed that plaintiff was estopped to deny defendant's right to possession, and in each case judgment went for the defendant.

There can be no doubt as to the legal position of the parties if the plaintiff pleads the due recovery of the judgment.

We believe that the cases cited show that she can plead that the judgment was duly recovered without committing perjury. Accepting her position, such allegation is but an allegation of the ultimate facts, or the legal effect of the facts, and to sustain such a pleading no citation of authorities would seem necessary. It is the universally recognized practice. But what will be the effect if this Court grants the plaintiff the relief asked? Simply because this Court enters a decree taking away the defense which the defendant has to the action at law, will that permit the plaintiff to allege in her contemplated action at law that the judgment was *duly recovered?* It certainly can have no effect upon the question of the due recovery of that judgment. It simply takes away Davis's defense. We are thus unable to see what force and effect the allegation of the plaintiff has in this light. It is simply a subterfuge to get into a court of equity, because a conscience of so fine a fibre could not rely upon a decree of a court in the year 1891 as truth of the allegation that a certain invalid judgment entered in the year 1873 was *duly* recovered.

(*C*). *Even assuming that for complainant to plead the jurisdictional facts, or to state that the judgment was duly recovered, would be perjury, this would not interfere with her adequate remedy at law. She could still plead in that way, and is not compelled to verify the complaint.*

(*D*). The Code of Civil Procedure, as originally passed in 1848, required the complaint in all instances to be verified. This provision was stricken out in 1849.

Code of Civil Procedure, 523.
Hempstead v. *Hempstead*, 7 How. Pr., 8.
Duval v. *Busch*, 21 Abb. N. C., 214.

Summary.

THUS, WHETHER THE COURT ADOPTS ANY OF THE FOREGOING THEORIES, WHETHER THE CODE APPLIES OR NOT, IT IS CLEAR THAT THE COMPLAINANT HAD AN ADEQUATE REMEDY AT LAW.

WHEN THE COMPLAINANT ACTUALLY CAME TO SUE AT LAW UPON THIS VOID CALIFORNIA JUDGMENT, SHE FOUND IN PRACTICE NONE OF THE DIFFICULTIES CLAIMED IN HER COMPLAINT IN THIS ACTION IN EQUITY.

The record in that suit is not in evidence, but we produce a certified copy of it here, and cite it simply as an authority. It is drawn and verified by the same counsel who drew the complaint in this equity suit, in which he said that such a complaint could not be sworn to without perjury. Such complaint is as follows:

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANGELICA WAKELEE,

Plaintiff,

vs.

ERWIN DAVIS,

Defendant.

The plaintiff, complaining of the defendant, by this her amended complaint, alleges, upon information and belief.

For a first separate and distinct cause of action:

I.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

II.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

III.—That on the eighteenth day of November, 1873, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State.

IV.—That on the eighteenth day of November, 1873, in said City and County of San Francisco, one Henry P. Wakelee, in an action wherein said Wakelee was plaintiff and this defendant was defendant, recovered a judgment in said court against this defendant, by the terms of which judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant, Erwin Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty 26/100 dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine 26/100 dollars.

V.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw, for value, and on November 9, 1886, Charles E. Laidlaw, for value, sold and assigned the said judgment to this plaintiff, who is still the owner thereof.

VI.—That no part thereof has been paid, and the whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

For a second separate and distinct cause of action:

VII.—That plaintiff is a citizen of the State of California, and resides therein, in the City of San Francisco.

VIII.—That defendant is a citizen of the State of New York, and resides therein, in the City of New York.

IX.—That on the eighteenth day of November, 1873, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State.

X.—That on the eighteenth day of November, 1873, in said City and County of San Francisco, one Henry P. Wakelee, in an action wherein said Wakelee was plaintiff and this defendant was defendant, recovered a judgment in said court against this defendant, by the terms of which judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant, Erwin Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty 26/100 dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting, in all, to twenty-two thousand eight hundred and nine 26/100 dollars.

XI.—That said judgment was duly given, made and entered by said District Court.

XII.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to

Charles E. Laidlaw, for value, and on November 9, 1886, Charles E. Laidlaw, for value, sold and assigned the said judgment to this plaintiff, who is still the owner thereof.

XIII.—That no part thereof has been paid, and the whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

For a third separate and distinct cause of action:

XIV.—That plaintiff is a citizen of the State of California, and resides therein, in the City of San Francisco.

XV.—That defendant is a citizen of the State of New York, and resides therein, in the City of New York.

XVI.—That on the 18th day of November, 1873, and for a year previous thereto, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction, duly created by the laws of that State.

XVII.—That on or about the nineteenth day of July, 1873, one Henry P. Wakelee commenced an action in the said court against the said Erwin Davis, and in the due course of the said action, on the 18th day of November, 1873, the said Henry P. Wakelee obtained a judgment of said court in his favor and against the said Erwin Davis, which said judgment still stands of record in said district, and is in full force.

XVIII.—That by the terms of said judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant,

Erwin Davis, in United States gold coin, the sum of twenty two thousand seven hundred and sixty 26/100 dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting, in all, to twenty-two thousand eight hundred and nine 26/100 dollars.

XIX.—That said judgment was so given and recovered without jurisdiction in said court of the person of said defendant (who was not then a resident of California), except by service, by publication, of the summons in said action by order of said court, and in accordance with the statutes of the State of California in such case made and provided, and without any proceeding *in rem*.

XX.—That subsequently, at various times during the year 1876, in open court, during certain proceedings in bankruptcy pending in the United States District Court for the District of California, entitled, "In the Matter of Erwin Davis, a Bankrupt," wherein this defendant was the bankrupt, this defendant, as a means to secure his discharge in bankruptcy, solemnly asserted said judgment to be, and adopted the same as, valid, still standing of record in said Fifteenth District, and in full force, and by reason of and based upon such assertion and adoption, did procure an order and adjudication of said court in bankruptcy dismissing the specifications of opposition to his discharge in bankruptcy filed by said Henry P. Wakelee, and did therefore and thereafter procure such discharge.

XXI.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to Charles E. Laidlaw, for value, and on November 9, 1886, Charles E. Laidlaw, for value, sold and as-

signed the said judgment to this plaintiff, who is still the owner thereof.

XXII.—That no part thereof has been paid, and thewhole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

XXIII.—That said judgment, recovered November 18th, 1873, was duly given, made and entered by said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

And for a fourth separate and distinct cause of action:

XXIV.—That plaintiff is a citizen of the State of California, and resides therein in the City of San Francisco.

XXV.—That defendant is a citizen of the State of New York, and resides therein in the City of New York.

XXVI.—That on the eighteenth day of November, 1873, and for a year previous thereto, the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, was a court of general jurisdiction duly created by the laws of that State.

XXVII.—That on or about the 19th day of July, A. D. 1873, one Henry P. Wakelee commenced an action in the said Court against the said Erwin Davis, and in the due course of the said action, on the 18th day of November, 1873, the said Henry P. Wakelee obtained a judgment of said Court in his favor and against the said Erwin Davis, which said judgment still stands of record in said District and is in full force.

XXVIII.—That by the terms of said judgment it was ordered, adjudged and decreed that said Henry P. Wakelee have and recover from said defendant, Erwin Davis, in United States gold coin, the sum of twenty two thousand seven hundred and sixty 26/100 dollars, with interest thereon at the rate of seven per cent. per annum, from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty two thousand eight hundred and nine 26/100 dollars.

XXIX.—That said judgment was so given and recovered without jurisdiction in said Court of the person of said defendant (who was not then a resident of California), except by service by publication of the summons in said action by order of said Court and in accordance with the statutes of the State of California in such case made and provided, and without any proceeding *in rem*.

XXX.—That subsequently, at various times during the year 1876, in open court, during certain proceedings in bankruptcy pending in the United States District Court for the District of California, entitled, "In the matter of Erwin Davis, a bankrupt," wherein this defendant was the bankrupt, this defendant, as a means to procure his discharge in bankruptcy, solemnly asserted said judgment to be and adopted the same as valid, still standing of record in said Fifteenth District and in full force, and by reason of and upon such assertion and adoption, did procure an order and adjudication of said Court in bankruptcy, dismissing the specifications of opposition to his discharge in bankruptcy, filed by said Henry P. Wakelee, and did therefore and thereafter procure such discharge.

XXXI.—That in February, 1881, said Henry P. Wakelee sold and assigned the said judgment to

Charles E. Laidlaw for value, and on November 9, 1886, Charles E. Laidlaw for value, sold and assigned the said judgment to this plaintiff, who is still the owner thereof.

XXXII.—That no part thereof has been paid and the whole amount still remains due, owing and unpaid to this plaintiff, with interest at the rate of seven per cent. per annum from November 18, 1873.

XXXIII.—That in a certain suit in equity in this Court, wherein this plaintiff was complainant and this defendant was defendant, brought upon the above alleged facts, after due appearance and answer by the defendant, and in due course of said suit, a decree was duly given, made and entered March 9, 1891, whereby it was ordered, adjudged and decreed that said defendant, Erwin Davis, his heirs, assigns, executors and administrators, be, and they and each and every of them are, forever estopped from claiming, alleging or setting up against the complainant, Angelica Wakelee, her heirs, executors, administrators and assigns, or any or either of them, by answer, demurrer, plea or other defense or declaration, complaint, bill of complaint, reply, replication, or in any other manner or form, in any action at law or suit in equity, or in any proceeding whatever in this or in any other jurisdiction, and from in any manner whatsoever and wheresoever maintaining, that said judgment (of November 18, 1873) was not duly given, made or entered by a court having competent jurisdiction, is not valid and does not still stand of record in said District Court of said Fifteenth Judicial District, and is not in full force against the said defendant, Erwin Davis, his heirs, executors, administrators and assigns, or any and every of them.

XXXIV.—And it was further ordered, adjudged and decreed in said equity suit, that a perpetual in

junction to this effect be issued against said Erwin Davis; and thereupon such other proceedings were had that said perpetual injunction was duly issued, of all which the said defendant, Erwin Davis, had due notice.

XXXV.—That said judgment recovered November 18, 1873, was duly given, made and entered by said District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

Wherefore, the plaintiff demands judgment against the defendant, Erwin Davis, in the sum of twenty-two thousand eight hundred and nine 26/100 dollars ($22,809.26) in United States gold coin, with interest at the rate of seven per cent. per annum, from November 18, 1873, besides the costs and disbursements of this action.

ANSON MALTBY,

Attorney for Plaintiff.

SOUTHERN DISTRICT OF NEW YORK, }
State of New York, } ss.:
City and County of New York, }

ANSON MALTBY, being duly sworn, says: That he is the attorney for the plaintiff herein, and resides at New Rochelle, in the County of Westchester; that the foregoing complaint is true to the knowledge of the deponent, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says, that the sources of his knowledge and the grounds of his belief as to all matters therein not stated upon his knowledge are as follows: The possession and inspection of exemplified copies of the judgment roll entered in the

action alleged in the foregoing complaint and of records docketed, in the matter of Erwin Davis, a bankrupt, in the United States District Court for the District of California, and the inspection of documents forming the judgment roll filed in a suit in equity in the United States Circuit Court for the Southern District of New York, March, 1891, wherein this plaintiff was complainant and this defendant was defendant.

Deponent further says that the reason why this verification is not made by said plaintiff is, that said plaintiff is not within the said County of Westchester nor within the State of New York.

ANSON MALTBY.

Sworn to before me this 15th day of February, 1892.

FIELDING L. MARSHALL,
Notary Public,
N. Y. Co.

City and County of New York, ss.:

FREDERICK N. KANNOFSKY, being duly sworn, says:

That he is 16 years of age and upward; that on the 16th day of February, 1892, between the hours of 12 M. and 1 P. M., at their offices in the Mills Building, in the City of New York, he served the foregoing amended complaint upon defendant's attorneys in this action, by delivering to, and leaving with, the person in charge of said office, personally, a true copy thereof.

FREDERICK N. KANNOFSKY.

Sworn to before me this 16th day of February, 1892.

FIELDING L. MARSHALL,
Notary Public,
N. Y. Co.

(Endorsed).—U. S. Circuit Court, Southern District of New York.—Angelica Wakelee, Plaintiff, against Erwin Davis, Defendant.—Amended Complaint.—Anson Malty, Attorney for Plaintiff, 48 Wall street, New York City.—U. S. Circuit Court.—Filed Feb. 16, 1892.—John A. Shields, Clerk.

In examining this complaint the following facts appear:

The first cause of action simply states that the California court was a court of general jurisdiction and that the plaintiff recovered a judgment.

This is pleading on the judgment without stating that the Court had jurisdiction over the person of the defendant, without stating any jurisdictional facts, without stating that the judgment was duly recovered. This is a proper mode of pleading. The complaint is not demurrable, and the plaintiff needed no aid from equity to enable her to plead in this manner.

The second cause of action alleges that the California court was a court of general jurisdiction; that the judgment was recovered and that it was duly entered.

In this cause of action the plaintiff evidently relied upon the Code of New York, which authorized such a judgment to be pleaded as duly recovered.

This cause of action was properly pleaded, was not demurrable, and the plaintiff needed no aid from equity in order to plead in this manner.

The third cause of action alleged that the California court was a court of general jurisdiction; that the plaintiff recovered a judgment which was void; that there were facts estopping the defendant from claiming it to be void; and that the judgment was duly made and entered.

In this cause of action the plaintiff set forth the

facts constituting the estoppel, showed the invalidity of the judgment, and alleged that the judgment was duly made and entered.

This mode of pleading was proper, the complaint was not demurrable, and the complainant needed no aid from any court of equity. And the same is true of the fourth cause of action.

From this examination it is clear that the plaintiff, in such action at law, relied for her first cause of action upon the rules laid down in the case of *Pennington* v. *Gibson*, in the 13th of How. With respect to the second cause of action, she relied upon the case of *Pennington* v. *Gibson* and upon the *New York Code*. In the third cause of action she relied upon the New York Code and upon the principle that estoppels could be pleaded in a declaration at law.

Consider now this precedent and the additional fact that the complaint was prepared and verified by the counsel who is counsel for the appellee, on this appeal. We submit that this precedent is the strongest kind of argument substantiating our position on this appeal, namely, that this suit is wholly lacking in equity, because the complainant needed no aid from equity in order to plead in a complaint at law. She could have pleaded in any of the methods which we have heretofore set forth.

Point IV.

The relief granted is broader than the claim made.

The bill states that complainant must sue at law in New York, and that in New York State's he has no adequate remedy at law, because she cannot set out a cause of action. The bill did not state, how-

ever, that outside of New York in any other part of the world would there be any difficulty in the complainant's framing a proper cause of action, and yet the injunction prevents Davis from pleading the invalidity of the judgment in any jurisdiction in any part of the world, even in jurisdictions, where, from all we know from the bill and the record, there is a perfect remedy at law.

Point V.

The Court erred in holding that Davis was estopped to claim that the judgment of the California Court was invalid.

Complainant claims that there is an estoppel both of record and in *pais*. We shall first discuss the question that there is no estoppel of record.

The sequence of events leading up to this judgment are as follows: In August and September, 1869, Davis made and delivered certain promissory notes to Wakelee. Subsequently, and on September 11th, 1869, Davis filed his petition in the United States District Court for the District of California, to be adjudged a voluntary bankrupt, and on September 30th, 1869, he was so adjudged (Rec., fol. 45).

Subsequently H. P. Wakelee proved in said bankruptcy proceedings thus begun, the debts evidenced by the said promissory notes.

Afterwards, and in June, 1873, H. P. Wakelee petitioned said bankruptcy court for leave to sue Davis, and by order of said Court, dated July 8th, 1873, he was given leave to bring an action or actions upon said promissory notes against Davis (Rec., fol. 67). Subsequently, in July, 1873, Wake-

lee began suit upon said promissory notes against Davis in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco. Davis was a non-resident of the State of California. The summons was served upon Davis by publication, in accordance with the provisions of the Code of California.

On November 18th, 1873, without personal service of the summons upon Davis, and without his appearance in person or by attorney, and without his answering or demurring, and without any proceedings by attachment *in rem*, H. P. Wakelee in said suit, entered judgment against Davis for twenty-two thousand eight hundred and nine dollars and twenty-six cents ($22,809.26), with interest at seven (7) per cent. from date until paid (Rec., fol. 46).

This judgment thus obtained was considered valid and enforceable in the State of California.

Hahn v. *Kelly*, 34 Cal., 391 (1868).

But, under the decision in the case of *Pennoyer* v. *Neff*, 95 U. S., 714 (1877), it would be held to be a void judgment—void as a judgment *in personam*, and void as a judgment *in rem*. Two years later the California courts adopted the law as laid down in this decision, in the case of *Belcher* v. *Chambers*, 53 Cal., 635 (1879), which is the law now recognized by the California courts. The date of these various decisions are important, and should, therefore, be borne in mind.

The contention of complainant in the court below was that the acts alleged, creating the estoppel, were of a mixed character, partaking of the character of estoppel by record, and estoppel *in pais*.

There is no Estoppel of Record, and for the Following Reasons:

1. The order of the Bankruptcy Court is not *res adjudicata*, because—

(*a*). It is interlocutory.

(*b*). The validity of the judgment was not passed upon.

(*c*). An estoppel should be mutual, and this order created no such estoppel.

2. If the order is *res adjudicata*, it creates no estoppel as to the judgment, because—

(*a*). The second proceeding in which the question is raised is for a different cause of action.

(*b*). The question of the judgment was not in dispute.

(*c*). It was not necessary to have decided as to the validity of the judgment.

(*d*). The oral argument of counsel was not evidence to show what was decided.

(*e*). Such a decision would not be binding on New York courts.

We will take up these various arguments in their order.

(*a*). AS THE ORDER WAS MERELY INTERLOCUTORY, IT IS *res adjudicata* OF NOTHING.

In order to constitute an estoppel of record there must have been a *judgment*. The order of October 31st, 1876, was not a final adjudication at all, and cannot operate to estop any party thereto. That order was simply the determination of an interlocutory motion, and assuredly it needs no citation of

authorities to this tribunal, for a proposition so fundamental, as that an order on a mere interlocutory motion is not such an adjudication as to estop the parties thereto in a subsequent action.

The language of the order is as follows:

> "It is hereby ordered, adjudged and decreed that all proofs of debt heretofore made and filed in this court by H. P. Wakelee against the estate of Erwin Davis, a bankrupt, be, and the same are, hereby cancelled; and it is further ordered, adjudged and decreed that the specifications of opposition heretofore filed in this court to the final discharge of Erwin Davis in bankruptcy by H. P. Wakelee be, and the same are, hereby dismissed and set aside, and shall in all things hereafter be disregarded" (Record, fol. 75).

The plaintiff contends that this so called "Order" is no order at all, but is a final decree, and refers to it in the bill of complaint as a "Judgment Order" (Rec., fol. 49, par. 21), seeking by these means to prove that the order in question has the affect of *res adjudicata*. But we submit there is nothing in the case to sustain this contention, or that the order of October 31, 1876, was in any way a final adjudication.

This will be plainly seen by analyzing the exact position at the time this motion was made, and the exact thing Davis sought to accomplish by the motion which resulted in this order. Davis had been adjudicated a bankrupt; he applied to the bankruptcy court, by a petition, for a discharge from his debts. Wakelee had previously proved his claims in bankruptcy. Afterward he abandoned his standing there and sued on his claims and entered judgment. To Davis's petition for discharge, Wakelee, acting presumably under Section 5111 of the United States Revised Statutes, filed with said court in said bankruptcy proceedings, specifications of opposition to such discharge.

The questions of fact presented by those specifications might have been tried at a stated session of the District Court (U. S. R. S., Sec. 5111).

Davis, however, took the position that Wakelee had no right or standing before the court to oppose his discharge, and accordingly presented to the bankruptcy court the petition of March 18, 1876, with a notice of motion to cancel Wakelee's proof of debt, and to dismiss and disregard his specifications of opposition (Rec., fols. 72 74). This motion resulted in the order of October 31st, 1876. This was in no wise a final adjudication. It was the formal *dismissal* of Wakelee from the court by reason of the fact that he himself had abandoned his position there. It adjudicated nothing. The fact that Wakelee did not appeal from this order cannot affect it as an adjudication. His failure to appeal from it gave it no greater effect than it otherwise would have had.

An interlocutory order can never operate as res adjudicata.

However serious may be the results of an order similar to the order of October 31st, 1876, if carried into operation it can never constitute an estoppel any more than a verdict without a judgment entered thereon. Such an order has nothing final about it; it might, at any time before the final discharge was granted to Davis, have been set aside or modified on the same or further or other facts. It was like a verdict which can always be set aside until judgment is entered, and when judgment is entered it is not the verdict, it is the judgment itself that operates to estop.

There are numereus authorities on this point.

> "The doctrine of *res adjudicata* does not apply to interlocutory judgments or orders which the Court which rendered them has power to vacate or modify at any time."

Van Brunt, J., in *Met. Ry. Co.* v. *Man. Ry. Co.*, 14 Abb. N. C., 103, at 215.

In *Reed* v. *The Directors of Locks and Canals*, 8 How., 274, at page 291, Judge Grier says:

> "There was no judgment of the Court upon the verdict, which alone could give it force or effect as *res adjudicata*."

In *Smith* v. *McCool*, 16 Wall., 560, at page 561, Judge Swayne says:

> "A verdict without a judgment is of no validity either as an estoppel, or as evidence."

In *Lorillard* v. *Clyde, et al.*, 99 N. Y., 196, at page 200, Miller, J., says:

> "The adjudication is not in the verdict, but in the judgment adopted by the Court."

See also *Hawkes* v. *Truesdale*, 99 Mass., 557; *Bigelow on Estoppel*, 5th Ed., p. 51; *Black on Judgments*, Vol. 2, Sec. 682.

The order of October 31st, 1876, was not final. True, it struck out Wakelee's specifications of opposition to Davis's discharge, but it was entirely in the power of the bankruptcy court at any time down to the very granting of the discharge to modify or even reverse said order upon the same or upon new or other facts.

The effect of interlocutory orders and the reasons why they do not operate as *res adjudicata*, are very clearly discussed by Finch, J., in *Webb* v. *Buckelew, et al.*, 82 N. Y., 555, at page 560, where the following language is used:

> "Where an actual decision on the merits has not been reached, or where a verdict of a jury or finding of a judge or referee has not passed into a judgment and so become absolutely fixed and final, the proceedings have no conclusive character and do not operate as a bar (*Carlisle* v. *McCall*, 1 Hilt., 399; *Audubon* v. *Excelsior Ins. Co.*, 27 N. Y., 216; *Leonard* v. *Barker*, 5 Denio, 220). It is, therefore, only a final judgment upon the

> merits which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence until the judgment, with its verity, settles finally and conclusively the questions at issue. *An interlocutory order is not such a judgment. It is not a judgment at all.*"

Even assuming that the order was final, it is not *res adjudicata* of any fact, except that Wakelee had no standing in court.

Wakelee filed his specifications of opposition. This was equivalent to a complaint or a declaration. The motion made by Davis to dismiss these specifications was, in effect, a demurrer to the jurisdiction. The decision of the court was simply that Wakelee had no standing in court. We can compare the situation with various analogous cases.

Suppose that a bill is dismissed for want of equity. This would not be *res adjudicata* of any fact.

Suppose that a suit is dismissed because of want of proper service. This would not be *res adjudicata* of anything.

Suppose that a suit is dismissed when reached on the calendar, because of the absence of the defendant's counsel. This would not be *res adjudicata*.

Suppose that a suit is dismissed because the plaintiff is not properly in court, as, for instance, when a transferee of a note in the United States courts attempts to sue when the original parties could not do so, or, for instance, where, under the Code in New York, a suit is brought by a non-resident against a foreign corporation. The court would dismiss these suits, but they would not be *res adjudicata* of anything.

Suppose that an action is dismissed on motion, because of a want of prosecution. This, likewise, would not be *res adjudicata*.

Yet, in all the cases mentioned, a *final judgment* would be entered, dismissing the suit or the action. Now, this, undoubtedly, would be a stronger case than where the dismissal was made by a mere order; but, nevertheless, the judgment would not be upon the merits. It would be a mere adjudication to the effect that, because of some imperfection in the plaintiff's case, or some negligence, or for some other reason, the court would not hear him. Nothing is decided, except that the party coming into court in that particular forum for some reason or other is not in a position to have his rights passed upon.

Compare now the situation in California. Wakelee brings his specifications of opposition, which are equivalent to a complaint at law, raising various issues of fact, making various charges. These were the only issues in the case. Now, if Davis had answered these charges, and a decision had been given sustaining or overruling them, this would have been final and conclusive. There would have been a trial upon issues of fact raised by the pleadings.

But the case did not get so far as a trial. Davis moved to dismiss. No issues of fact were considered. The only question was, is Wakelee properly in court as a party plaintiff? The judge said no, and Wakelee was dismissed. The dismissal did not adjudicate that the charges were not well founded. The dismissal did not import any decision on any question, except that the plaintiff, Wakelee, bringing his specifications of opposition, was improperly in court.

It is not deemed necessary to cite authorities to show that even *judgments* of dismissal, under such conditions as these, are in no sense *res adjudicata*. They decide nothing on the merits.

The order relied on cannot certainly have a broader effect than a judgment of dismissal would have, and for like reasons cannot be *res adjudicata*.

(*B*). THE VALIDITY OF THE JUDGMENT WAS NOT PASSED UPON BY THE COURT IN BANKRUPTCY.

There is nothing in the record which shows that that validity of the judgment was passed upon, or argued, or considered by the court in the proceedings which resulted in the order of October 31st, 1876.

There was no opinion filed by the Judge who granted this order, and we are therefore left to the moving papers used on that occasion to determine what questions were before the court. They reveal, very clearly, the questions upon which this order was asked. The notice of motion (Rec., fol. 72) states that it will be made upon, "the annexed petition, and upon the files, records, papers and proceedings," &c. The petition reads as follows:

> "And now comes Erwin Davis, the above-named bankrupt, by his attorney, R. Thompson, and moves the court for an order cancelling the proof of debt heretofore made in the above-entitled cause against the estate of the said Erwin Davis by Henry P. Wakelee, and to dismiss and disregard the specifications of opposition filed by the said Henry P. Wakelee to the discharge of said Erwin Davis in bankruptcy, *on the following grounds*, that is to say: The said Henry P. Wakelee on or about the 28th day of June, A. D. 1873, and after he had proved up his debt or claim against the said estate of Erwin Davis, petitioned this court for, and on or about the 8th day of July, A. D. 1873, obtained from this court an order granting leave to the said Henry P. Wakelee to commence any action or actions at law, or suits in equity, against the said Erwin Davis, the bankrupt herein, as he may be advised, in any State or country having jurisdiction of the person or property of the said Erwin Davis. That thereafter, to wit, on or about the 19th day of July, A. D. 1873, the said Henry P. Wakelee commenced, in the Fifteenth Judicial Court in and for the City and County of San Francisco, an action against the said Erwin Davis,

> for the same cause of action on which he had proved up his debt in the said bankruptcy proceedings, and in the due course of said action the said Henry P. Wakelee obtained a judgment of the said Fifteenth District Court in his favor and against the said Erwin Davis, which said judgment still stands of record in the said Fifteenth District, and is in full force."

We have here clearly expressed the object of the motion, namely: To cancel the proof of debt in the bankruptcy proceedings on the theory that the creditor, Wakelee, having abandoned his standing in the bankruptcy court, and having sued on said claim, had, by his election, deprived himself of any standing in the bankruptcy proceedings, and was, therefore, not before the court in such a position as to entitle him to oppose the discharge of Davis.

In the endeavor to prove that the validity of the judgment was passed upon in this proceeding, and that said order could not have been granted except upon adjudging that the judgment of November 18, 1873, was a valid judgment, the complainant called as a witness Judge Hoffman, before whom the motion was heard. His testimony is found at fols. 131 to 134 of the Record. It reveals, however, that he had absolutely no recollection, "refreshed or otherwise," as to the argument that was made upon that occasion, nor the authorities cited by the respective counsel, nor the precise grounds upon which the order was made. The notes of argument made by him upon that occasion contained the citation of authorities of counsel, and, under objection of appellant's counsel, were introduced in evidence in the hope that they might sustain complainant's contention.

An examination of these authorities, taken by Judge Hoffman during the argument, entirely disproves this contention, inasmuch as every case noted by Judge Hoffman is on the question whether a creditor, who, during the pendency of bankruptcy

proceedings, enters judgment upon a debt proved in said proceedings, thereby takes himself out of the bankruptcy court, and whether, after judgment, he is in position to oppose or take any step whatever in the bankruptcy proceedings.

This theory as to the grounds upon which this motion was made is supported by the testimony of counsel of the respective parties as to their recollection as to what was said upon the argument of said motion, and negatives the claim that the validity of the judgment was passed upon at all. At fols. 126 and 127 of the Record is found the testimony of Naphtaly, counsel for plaintiff in that proceeding, which was taken subject to exception of appellant's counsel. It is as follows:

> "The motion to dismiss was made upon the ground that these gentlemen had procured a judgment, and had taken themselves outside of the jurisdiction of the bankruptcy court by trying to improve their condition; and that, having done so, * * * they had taken themselves out of the jurisdiction of the bankruptcy court voluntarily, and that they had no right to prevent Mr. Davis's discharge by reason thereof. We claimed, on the other hand, that it did not make any difference. That the debt had not been merged in the judgment so as to drive them out of court, so to speak, and not allow them to participate in the proceeding against Davis. We were apprehensive that the discharge in bankruptcy would discharge the judgment debt just the same as it would have discharged the original debt as it existed at the time of filing the petition. Judge Hoge strenuously argued that this was not so; that the new judgments would not be discharged by the bankruptcy proceedings, and that we would lose nothing by it. That, in substance, according to my recollection, is what occurred in court at the time."

There is no statement here as to the *validity or invalidity of the judgment in question.*

The testimony of Robert Thompson, who acted

as appellant's counsel on that occasion, taken on behalf of the respondent (Rec., fols. 174-175), shows that his recollection of the argument made at the time was practically the same as that of plaintiff's counsel, namely: *That the sole question passed upon by Judge Hoffman was, whether a creditor proving his claim in bankruptcy, and afterward entering judgment on the same debt, has any standing in a court of bankruptcy to oppose the discharge of the bankrupt.*

Further, we do not believe that any one at that time ever *thought* of questioning the validity of the judgment. Why should they? The California courts in Hahn *v.* Kelly (34 Cal., 391), in 1868, had expressly held such a judgment to be a valid judgment, and the U. S. Supreme Court had never passed upon the question. Is it not an insult to common sense to suggest that, under these circumstances, the validity of this judgment was questioned by California lawyers before a California court?

(C). AN ESTOPPEL MUST BE MUTUAL. IF COMPLAINANT'S ARGUMENT IS GOOD, COMPLAINANT WOULD BE ESTOPPED TO DENY THAT THE CALIFORNIA JUDGMENT IS VALID.

Estoppels must be mutual.

> Keokuk Railroad *v.* Scotland Company, 152 U. S., 318, 326.

Illustration: Suppose that the complainant, after the rendition of the order which dismissed him from the bankruptcy court, had brought suit on the notes, claiming that the judgment was void; that *Davis* had set up the fact of the recovery of the judgment; that the judgment was *valid*, and that the complainant was *estopped* to claim it was invalid because of this *order* of the bankruptcy court.

This would be the result if the order was an ad-

judication, and yet the mere statement of such a proposition is its own best refutation. But if the complainant would not be estopped under these circumstances, how can Davis be estopped as to the same judgment by reason of the same order?

And if complainant is estopped to deny that the judgment is not valid, then it is valid as to him. What need, then, of complainant coming into a court of equity for aid in suing on a *valid* judgment?

2. ASSUMING THAT THE ORDER OF THE BANKRUPTCY COURT IS *res adjudicata*, IT, NEVERTHELESS, IS NOT *res adjudicata* WITH RESPECT TO THE VALIDITY OF THE JUDGMENT.

(*a*). The second suit or proceeding in which the validity of the judgment is called in question, although between the same parties or their privies, is for a different cause of action. Hence, the order is *res adjudicata* only of what was actually decided, and not of what might have been incidentally decided.

When, upon the same or a similar cause of action, a second suit is brought, then, and then only, is the judgment in the first suit conclusive as to both what was actually determined and *what might have been offered as a claim or defense.*

> Dowell *v* Applegate, 152 U. S., 327 and 343 and cases cited.

Memorandum: If the order is *res adjudicata*, nevertheless the second action is upon a different claim or demand, and hence not binding as to the validity of the judgment, because that was not decided.

> Wilmington *v* Alsbrook, 146 U. S., 279, 302.

Held:

> "The causes of action are not identical, or the questions actually litigated are not the same." "Even if that question might have been raised, this suit, being upon a different cause of action, the judgment in the former case cannot operate as determining *what might have been*, but was not brought in issue and passed upon."
>
> Cromwell *v.* County of Sac, 94 U. S., 351;
> Nesbitt *v.* Riverside, 144 U. S., 610.

Where a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to these matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

> Dowell *v.* Applegate, 152 U. S., 327, 344, and cases cited.

Among the essentials of an estoppel by judgment is the identity of the cause of action.

> McComb *v.* Frink, 149 U. S., 641, and cases cited;
> Cromwell *v.* County of Sac, 94 U. S., 351, 353.

It is said in Nesbit *v.* Riverside, 144 U. S., 610, 620:

> "Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others. Infancy is pleaded in an action on a contract, and an adjudication establishes it as a defense. In a second suit between the same parties on a different cause of action, though created at the same time, may not the plaintiff prove ratification after majority?
>
> Many reasons may induce or prevent the

> introduction into the first case of all the facts. It was well said in Cromwell *v.* County of Sac, page 356, that 'various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in the controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same *transaction*.'"

A judgment on a demurrer is *res adjudicata* only with respect to the exact point raised by the pleadings and decided, and is not a bar to a second suit for other breaches of the same covenant.

> Wiggins Co. *v.* Railroad, 142 U. S., 396;
> Washington Co. *v.* Sickles, 24 How., 333, and 5 Wallace, 580;
> Gould *v.* Evansville R. R., 91 U. S., 526;
> Boyd *v.* Alabama, 94 U. S., 645;
> Russell *v.* Place, 94 U. S., 606, 608;
> Morrell *v.* Morgan, 65 Calif., 575.

In Hopkins *v.* Lee, 6 Wheat., 109, it is held that a judgment is not *res adjudicata* with respect to a point which came only collaterally into consideration, or was only incidentally considered, or which can only be argumentatively inferred from the decree.

Let us analyze the situation in the two litigations. Years ago, in California, H. P. Wakelee brought his complaint (specifications of opposition), alleging fraud, &c., and demanding as relief that Davis be not discharged.

Davis demurred (moved to dismiss) on the ground that Wakelee had no standing in court.

The order adjudicated only on the issues raised, namely, Wakelee's standing in court, and decided *that Wakelee had no standing in court.* This and this only would be the question adjudicated.

The present suit in equity is a bill to enjoin Davis from pleading that the judgment in California is invalid. The parties are in privity, the cause of action is entirely different, and the only matter *res adjudicata* is that Wakelee had no standing in the bankruptcy court years ago.

The proposed action at law would be to recover on the judgment of the California court. The parties are in privity. The cause of action is different. The only matter there *res adjudicata* would be that Wakelee had no standing years ago in the bankruptcy court.

If Wakelee had brought his action at law and had argued that the order was *res adjudicata* as to the validity of the judgment, he would have to show that the action at law was an action between the same parties or their privies *for the same cause of action* as was the cause of action in the bankruptcy court which resulted in the order, and, of course, he could do nothing of the kind. The causes of action have nothing in common. How extraordinary is it, therefore, for him to attempt to do by the aid of equity what, in itself, he could not do in an action at law!

He cuts off a valid defense in the law action by an injunction, thus getting the equity court to decree that, although the order never was and never could be *res adjudicata*, yet that it, the equity court, would create an estoppel of record which could not be shown in the law action itself and which has no foundation under the rules of law which we have recited.

It is not thus that courts have been wont to rule on the question of the binding force of judgments, and we believe that such a creation of legal rights, or rather such an annihilation of legal defenses by

the decree of a court of equity, will not receive the sanction of this court.

(*B*). THE QUESTION OF THE VALIDITY OF THE CALIFORNIA JUDGMENT WAS NOT IN DISPUTE.

The only litigated question before the court on the motion which resulted in the order of October 31, 1876, was, the effect of admitted facts.

The petition on which the motion was made, after stating the facts relative to entry of judgment, concludes:

> "Which said judgment still stands of record in the said Fifteenth District and is in full force."

We claim that this is not an admission of the validity of the judgment of November 18th, 1873. It was simply the statement "that said judgment" entered in 1873, was, at the time of making the motion, namely, the 18th of March, 1876, in the same force that it was at the time of its rendition, and no greater force.

But suppose that, for the purpose of that motion, the validity of that judgment was *admitted*, the parties to that motion are now entirely at liberty to dispute the truth of said fact in this new and different litigation.

Because the court acted on an assumed state of facts on that motion—namely, that the judgment of November 18, 1873, was valid—it by no means follows that neither Davis nor Wakelee can now dispute the truth of that fact then admitted.

This very question, as it seems to us, has been set at rest by authorities of great weight and cogency.

In *Mason's Executors* v. *Alston*, 9 N. Y., 28, the action was brought by the executors of the will of John Mason against one of the daughters of the testator and her husband. John Mason died September 26, 1839, and his will was admitted to probate and letters testamentary issued to the plaintiffs

in the action as sole executors October 25, 1839. October 20, 1840, Mrs. Alston and her husband filed before the Surrogate allegations contesting the probate. Proofs being taken under these allegations the probate was confirmed by the Surrogate, whose decision was affirmed, on appeal to the Circuit Judge, in November, 1844. The Supreme Court, on further appeal, reversed the former decision and awarded an issue to try the question of the due execution of the will. It was the trial of this issue which was sought to be enjoined in the present action, and a perpetual injunction was awarded at Special Term, but the General Term, on appeal, dismissed the complaint.

The grounds on which the injunction was asked were as follows:

March 26, 1840, James Mason, a son of the testator, filed his bill in Chancery against the present plaintiffs and all persons interested in the estate of John Mason, including Mr. and Mrs. Alston. The bill set forth the due execution of the will and claimed a distribution of the estate as in case of intestacy, on the ground that the trusts declared therein were repugnant to the statutes, and therefore void. March 30, 1841, Mr. and Mrs. Alston filed their separate answer, which contained the following clause: "And these defendants, further answering, admit that the devise of real and personal estate contained in the said instrument purporting to be the last will and testament of the said John Mason, if said instrument were duly executed and published as such, is nevertheless, as these defendants are advised and believe, utterly null and void and have no legal effect."

Upon the hearing of that cause in May, 1845, there being some infant defendants, the probate of the will was put in evidence, but the will itself was not proved. The assistant Vice-Chancellor decreed that the bill be dismissed on the ground that the trusts were "not repugnant to the provisions of the Revised Statutes or Laws of this State."

It was claimed in the present action that the defendants were concluded by this decree from contesting the due execution of the will, and the complaint prayed that the trial of the issue might be enjoined.

The Court of Appeals affirmed the judgment below, dismissing the complaint.

WILLARD, J., delivering the opinion of the Court, says:

> "The object of the bill filed by James Mason against the executors of his father's will, and others interested in that estate, was to have the provisions of the will declared inoperative and void, as contrary to the statute, and the estate distributed in the same manner as if the testator had died intestate. All the parties engaged in that litigation *took for granted* the valid execution of the will. The whole matter in controversy, which was passed upon and tried in the courts, was whether the provisions in the will were in conflict with the Revised Statutes.
>
> The decision of that question did not prevent any of the next of kin, although parties to that suit, from contesting the validity of the will by direct proceeding before the Surrogate in the manner pointed out by the statute. In that proceeding the only inquiry is whether the instrument in question is the last will and testament of the supposed testator. This goes to the *factum*—the legal execution of the will only. The other action made no issue upon this point, and its admissions of the execution of the will is merely argumentative. It was not put in issue by the cause, nor could it have been made a material issue in that action. One of the principles in relation to an estoppel is that it must be certain to every intent, and not be taken by argument or inference." (Co. Litt., 352 b).

This decision is specially applicable to the present case.

In the case quoted the argument was as follows: Only a valid will can contain valid trusts. Now,

the Court decided that the trusts in Mason's will were valid, and, therefore, it must be decided that the will itself was valid. There is no disputing the first premise; but it does not follow that because a court decides that the trusts of a will are valid, it therefore, necessarily decides that the will itself is valid. That fact may be admitted, and in the case quoted was admitted. In that event the only question decided is not the admitted fact, but the *effect* of the fact so admitted.

The present case is almost identical with the case quoted. Here the Court decided, according to appellee, that the judgment of November 18, 1873, merged the original promissory notes and destroyed them as an existing claim. This was true only in case the judgment of November 18, 1873, was valid; but it does not, therefore, follow that the Court decided that said judgment was valid. That fact was not drawn *in* question - it was not in issue. *It was assumed;* and the only question before the Court, and, therefore, the only question determined by the Court, was the effect of that admitted fact. The admitted fact may now be denied, and proved to be not as then admitted.

The position of Davis in the bankruptcy court was almost precisely the same as that of Mason's executors in the case quoted. It can make no difference that Davis resorted to a motion in the bankruptcy court, instead of resorting to a separate action in equity. It is perfectly possible that Davis, instead of moving to strike out Wakelee's specifications of opposition, could have brought an equity action to restrain him from filing the same, or, after filing them, from insisting upon or proving them. If he had begun such an action upon the facts stated in the petition of March 18, 1876, and the fact of the validity of the judgment of November 18, 1873, had been admitted in said action, as it was on said motion, the question involved would be identical with the question in the case quoted, and

it would be absurd to argue that at this day Davis could not dispute the truth of the fact so asserted—namely, the validity of the judgment.

The fact that Davis resorted to a motion in the bankruptcy court, instead of to an independent action, cannot affect the question of *res adjudicata*, or the effect of the order of October 31, 1876, as an estoppel.

A very similar question arose in the case of *Boyd* v. *Alabama*, 94 U. S., 645. Error to the Supreme Court of Alabama.

Prior to the year 1868 there was a statute in Alabama prohibiting lotteries and imposing a fine upon any person setting up or carrying on a lottery without legislative authority. On October 10, 1868, the Legislature of Alabama passed a certain act, which allowed the carrying on of certain lotteries. This last act was repealed in March 1871. Defendant was indicted for setting up and carrying on a lottery without legislative authority, and was convicted and sentenced to pay a fine of $1,000. The Supreme Court of Alabama affirmed this judgment. At the trial, the defendant admitted that he had been engaged in the setting up and carrying on of a lottery in Mobile, Alabama, within twelve months before the finding of the indictment. He claimed a license for that purpose under the Statute of 1868, he being one of the persons named therein, and the State admitted that the defendant had paid the money required by the Statute of 1868 into the treasury in November of the preceding year, and that the acts with which he was charged were done under that statute and would be legal if the statute were constitutional and it were not subsequently repealed.

In a former case by the State of Alabama against the same defendant, upon an indictment of a similar kind for a previous offense of setting up and carrying on a lottery, the Supreme Court of the State of Alabama had held that the statute in question constituted a contract and that the repealing act was for that reason void. The defendant, there-

fore, contended that the question of the constitutionality of the Statute of 1868 was *res adjudicata*, and that the State of Alabama could not, on the trial of the present indictment, dispute the constitutionality of that act.

Judge Field, in delivering the opinion of the United States Supreme Court, says:

> "The questions thus presented for our consideration relate to the constitutionality of the Act of 1868, and the effect upon the right or privilege there conferred of the repealing Act of 1871. The defendant contends that the right or privilege to set up and carry on lotteries in the State conferred by the act, rests on a contract, a consideration being given for its grant by the prescribed yearly payment into the treasury and that the repealing act cannot, therefore, impair it. In consequence of a previous adjudication of the supreme court of the State, construing the act as constituting a contract on the principles therein named, the defendant there contends that the State is estopped from denying its constitutionality.
>
> It is true, that in a former case against the same defendant upon an indictment of a similar kind for a previous offense of setting up and carrying on a lottery, the supreme court of the State held that the statute in question constituted a contract, and that the repealing act was for that reason void; but in that case the only subject before the court was the meaning of the statute—whether its provisions in their terms amounted to a contract which a subsequent enactment would not impair. The constitutionality of the act was *not drawn in question; that was not denied.*"

The Court held that the State was not estopped, and affirmed the conviction.

It is apparent that in the case quoted, on the trial of the first indictment, the defendant claimed that the right or privilege conferred by the Act of 1868 rested on a contract, a consideration being given for its grant by the prescribed yearly payment into

the treasury, and that the repealing Act of 1871 could not impair it.

The constitutionality of the Act of 1868 was asserted by the defendant and admitted by the State of Alabama; and the only question then determined by the Court was as to the effect of the Act of 1868, assuming it to be valid.

In the present case Davis asserted that on November 18, 1872, Wakelee had entered judgment. The truth of this assertion was admitted, *but not the validity of said judgment.*

That was not drawn in question.

(*C*). IT WAS NOT NECESSARY FOR THE COURT IN BANKRUPTCY TO HAVE DECIDED CONCERNING THE VALIDITY OF THE JUDGMENT.

Estoppels are not favored.

> *Jackson* v. *Brinckerhoff*, 3 Johnson's Cases, 101.

The affirmative is upon the party asserting an estoppel to prove that the question or matter has been, in fact, necessarily litigated and decided between the same parties or their privies.

> *Campbell* v. *Butts*, 3 N. Y., 173.
> *Doty* v. *Brown*, 4 N. Y., 71.
> *Dunckel* v. *Wiles*, 11 N. Y., 420.
> *Stowell* v. *Chamberlain*, 60 N. Y., 272.
> *Dawley* v. *Brown*, 79 N. Y., 398.
> *Terrett* v. *Cowen Howe*, 11 Hun, 320.
> *Cromwell* v. *County of Sac*, 94 U. S., 351.
> *Kerr* v. *Hays*, 35 N. Y., 351.
> *Patrick* v. *Shaffer*, 94 N. Y., 423.
> *Clemens* v. *Clemens*, 37 N. Y., 73.

A judgment is conclusive only upon the parties thereto or their privies, and only in respect to the

grounds necessarily covered by it, and the law and facts necessary to uphold it.

People v. *Johnson*, 38 N. Y., 63.
Campbell v. *Consalus*, 25 N. Y., 613.
Woodgate v. *Fleet*, 44 N. Y., 1.

A verdict and a judgment are conclusive by way of estoppel only as to facts, without the existence and proof of which they could not have been rendered.

This doctrine is illustrated in the case of *Burlen* v. *Shannon*, 99 Mass., 200. The plaintiff brought an action to recover of the defendant $3,000.00, being the amount alleged to be due him for board of the wife of the defendant. The defendant set up as a defense that he had been legally divorced from his wife in Indiana four years before. The record in the Indiana suit was introduced in evidence; also the record of a suit brought by the wife of the defendant against defendant for divorce in the State of Massachusetts, in which the defendant had denied the charges and had set up as a defense the divorce in Indiana. In the wife's suit for divorce in Massachusetts, she had sought to impeach the validity of the Indiana divorce, on the grounds: (1). That the defendant had gone there for the purpose of procuring the divorce. (2). That at the time of its rendition he was not a citizen of the State of Indiana. This case was tried before a jury, who found five findings of fact, the first three of which negatived the misconduct of the defendant and must have resulted in a verdict in his favor. The fourth and fifth findings negatived respectively the grounds upon which plaintiff had sought to impeach the Indiana divorce. On this state of facts the trial Judge, in *Burlen* v. *Shannon*, directed a verdict for the defendant upon the ground that the findings of the jury in the case of *Shannon* v. *Shannon*, were *res adjudicata* as to the validity of the Indiana divorce. Upon appeal the judgment was reversed on

the ground that the judgment in *Shannon* v. *Shannon* was inevitable without the fourth and fifth findings.

See in this connection *Hawley* v. *Sanger*, 5 Dem., 82, which holds that when a decision could have been rendered without deciding the fact afterwards sought to be set up (when the decision does not expressly decide the fact), that fact may afterwards be brought into dispute.

In the case of *Lewis* v. *O. N. P. Co.*, 125 N. Y., 341, at page 348, Peckham, J., used the following language:

> "Where a judgment may have proceeded upon either or any of two or more different and distinct facts, the party desiring to avail himself of the judgment, as conclusive evidence upon some particular fact, must show affirmatively that it went upon that fact, or else the question is open for a new contention."
>
> *Bell* v. *Merifield*, 109 N. Y., 202, 211;
> *Russell* v. *Place*, 94 U. S., 606;
> *Cromwell* v. *County of Sac*, 94 U. S., 354.

See also language of Earle, J., in *Zoeller* v. *Riley*, 100 N. Y., 102, 107:

> "It is sufficient to say that we cannot be certain that there was in that action any adjudication condemning that mortgage, and the burden was upon the defendant to establish that fact."

To the same effect is *Sterns* v. *St. L. and S. F. R. R. Co.*, 4 State Rep., 715.

TO OUR MIND THERE ARE FOUR DIFFERENT GROUNDS UPON WHICH THE DECISION CONTAINED IN THE ORDER OF OCTOBER 31ST COULD HAVE BEEN RENDERED.

(*a*). Wakelee, having proved his debt in bankruptcy against the estate of Davis, had thus stayed

himself from pursuing any remedy against Davis except in the bankruptcy court. Subsequently, however, Wakelee applied to the bankruptcy court to vacate that stay and to permit him to sue Davis, and the court granted him "leave to commence any action or actions at law, or suits in equity, against Davis in any court or courts in any State or country having jurisdiction of the person or property of said Davis" (Rec., fol. 67). This was an abandonment by Wakelee under the court's sanction of his standing in court. The consequence of this was to dismiss the bankruptcy proceedings as to this creditor, and so he had no interest, and therefore no standing to oppose a discharge.

This was the actual view taken as to the effect of a precisely similar order granted by the same court to another creditor of this same Davis, namely, McDonald, by the Supreme Court of New York, in the case of *McDonald* v. *Davis*, 26 Hun, 53, where Davis, J., says:

> "It was equivalent to a dismissal of the proceedings in bankruptcy, *pro tanto*, and, in so far as they affected the appellant's demand, proved in bankruptcy, and which might be recovered in the pending suit."

(*b*). The court might have reasoned in this way: Wakelee had the choice of two remedies—one in the bankruptcy court and one outside of and independent of that court. At first he proved his claim in the bankruptcy court. This fact stayed all other proceedings to collect his claim and confined him to the bankruptcy court for a remedy. Subsequently, however, on his application, the bankruptcy court vacated the stay which resulted from the proof of his debt in bankruptcy, and allowed him to resort to remedies outside the bankruptcy court. He resorted to an action in the State of California and obtained judgment therein. Subsequently he sued on said judgment in France and

attached property of Davis. This litigation was thereafter removed by consent to England, and was being pressed at the time of this motion to cancel Wakelee's proof of debt and dismiss his specifications of opposition (Rec., fol. 136). Davis filed his petition for a discharge. Wakelee was then called upon to decide which one of his remedies he would continue to pursue. Having proved his debt, and that proof still being unexpunged, he could still resort to the bankruptcy court, but only on the condition that he should yield the remedies in other courts, provided Davis should get a discharge. This Wakelee was unwilling to do. His choice lay between the remedies in the bankruptcy court and remedies out of that court, and his decision being to rely upon his remedies outside of the bankruptcy court, all that was then left to that court was to deny him any standing or right to remain therein and to oppose the discharge. Hence the order of October 31, 1876.

(*c*). The third position is similar to, but not identical with, the second. Wakelee, after the adjudication of Davis as a bankrupt and after he had proved his claim in the bankruptcy proceedings, secured leave to sue Davis on the promissory notes, did sue him, and obtained judgment November 18th, 1873. The judgment merged the original promissory notes and formed a new debt which did not exist at the time of the adjudication, and was, therefore, not provable in bankruptcy. As only debts provable in bankruptcy could be affected by a discharge, this judgment could not be discharged, and therefore its owner, Wakelee, had no interest, and therefore no right to oppose the discharge. Hence the order of October 31st, 1876.

(*d*). The plaintiff's predecessor, H. P. Wakelee, filed, in the bankruptcy court in California, specifications of opposition, and Davis made a motion to

dismiss them, upon all the papers and proceedings, as well as upon a petition.

This motion was broad enough to allow the Judge to dismiss the specifications on any ground which seemed to him sufficient, and no one knows what the ground was which operated on his mind. He himself has no recollection on the subject; but it might well have been, and *non constat* but that it was on the ground that *the specifications were too indefinite and too general to raise any issue which could be tried.*

An examination of the specifications (Record, pages 12 and 13) will show that they were based upon fraud, alleged to have been committed by the bankrupt—fraud in concealing his books; in not keeping books of account; in procuring assent of creditors to his discharge by pecuniary considerations, &c.

Now, it is a well known rule of pleading in civil actions that a plaintiff or complainant must so plead the cause of action as to apprise the defendant of what he has to meet. This is true with respect to civil actions and contracts. When a civil action is brought, charging fraud, the courts require that the charges of fraud should be stated with great particularity and definiteness, in order that the defendant may know what he must meet at the trial. The rules in civil actions in pleading, with respect to charges of fraud, are analogous to the rules relegating indictments where fraud is charged. It is a well known rule that, in such cases, the particulars of the fraud, all the elements of the fraud, with time and circumstances, must be definitely and specifically set forth.

The mere averment that there was fraud, or that there was a false pretense, is not sufficient, either in criminal or civil cases.

King *v.* Perrott, 2 M. & S., 379;
People *v.* Stone, 9 Wendell, 182;

People *v.* Haynes, 11 Wendell, 557;
People *v.* Gates, 13 Wendell, 311;
3 Chitty's Criminal Law, 999 to 1021;
Archibold's Criminal Pleading, 245 to 247;
Wharton's American Criminal Law, 643;
2 Chitty on Pleading, 680 to 711.

In both civil and criminal proceedings, in pleading, it is necessary to set out the particular acts and circumstances making up the fraud.

Wood *v.* Carpenter, 104 U. S., 140;
Sterns *v.* Page, 7 How., 819, 829;
Moore *v.* Green, 19 How., 69 to 72;
Baubine *v.* Baubine, 23 How., 190;
Woolensack *v.* Rheiber, 115 U. S., 102 (citing 7 How., 819; 19 How., 69; 21 Wall., 185; 99 U. S., 201; 2 Wall., 95; 101 U. S., 135; 106 U. S., 391).

In all pleadings, whether criminal or civil, all doubts are resolved against the pleader.

United States *v.* Linn, 1 How., 104–111;
1 Chitty on Pleading, 578.

It is unnecessary to multiply authorities on this point. We submit that the rules are well settled.

Now, an examination of these specifications of opposition discloses the fact that they violated every one of the foregoing rules. They did not state the particulars with respect to any of the fraudulent acts alleged. They were nothing but a mere bald charge that the bankrupt had been guilty of various frauds. It is very clear that a declaration or a complaint or an indictment containing such allegations, and nothing more, would be held insufficient to raise any question for trial.

This being the case, it is evident that Judge Hoff-

man, on the motion to dismiss, had a right to strike out these specifications of opposition on this ground alone, and no one now can possibly be in a position to say that this was not the reason for his action.

It is respectfully submitted, in view of the decisions at that time, that the order of October 31, 1876, would be a logical conclusion from each of the positions outlined above. None of them in anywise related to the validity of the judgment. How, then, in the light of the foregoing decision, can it be said that the order of October 31, 1876, is *res adjudicata* of the validity of the judgment? We submit that it is not

(*D*). THE EVIDENCE OF THE ORAL ARGUMENTS OF COUNSEL AS TO WHAT OCCURRED WAS INCOMPETENT AND INADMISSIBLE TO SHOW THE GROUNDS UPON WHICH THE COURT DECIDED IN THE BANKRUPTCY PROCEEDINGS.

The complainant against the objection and exception of appellant, called as witnesses the counsel who argued said motion, and asked them to state, and they did state, to the best of their recollection, the arguments which were urged by Davis's attorney in support of said motion (Rec. testy. of Barnes, fols. 115 to 117; testy. of Naphtaly, fols. 125 to 128).

This testimony was objected to by appellant and motions made to strike it out. We claim that the arguments of counsel are incompetent as evidence to show what it was that was determined by the Court in the order of October 31, 1876. As well might the Court resort to the summing up of counsel to the jury in a jury case as evidence of the questions decided by the jury.

This precise point was decided in the case of *Greenlee agst. Lowing and ors.*, 35 Mich., 63.

The action was brought to recover upon a replevin bond. There had been a former action between the same parties upon the same bond, and a judgment for the defendant. After the files and

judgment in the former case had been admitted in evidence, plaintiff's counsel offered in evidence the brief of defendants' counsel upon the former trial to show that the only point contested in that case was the sufficiency of the return of the execution, to prove a breach of the condition of the bond, for the purpose of showing that the judgment in that case was not upon the merits, and therefore not a bar to the present action. The evidence was rejected and an exception taken.

The Court said (per Marston, J.), at page 99:

> "We discover no error in the rejection of the brief. Briefs of counsel are not an unerring indication of the basis upon which a judgment has been rendered. They sometimes omit to discuss questions considered by the Court, and frequently discuss those not involved in the case. We are of the opinion that for the purpose offered the brief was not admissible."

For like reason the testimony of jurors as to the particular ground upon which they found a verdict is not admissible to prove what is determined by their verdict.

In *Packet Co. agst. Sickels*, 5 Wall, 580, at p. 593, Judge Nelson says:

> "Some of the jurors in the former trial were permitted to testify as to the particular ground upon which they found the verdict. Their testimony was not objected to, and therefore is not available as error here; but it is proper to say that the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or findings. The jurors oftentimes though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it."

The clear character of such evidence is plainly illustrated in the language of the Court in *Hen-*

derson v. *McAleenan*, 29 St. Rep., p. 406, at page 407.

> "An advocate's statements are always supposed to be adapted to the exigencies of the case on trial and colored by what he conceives his client's best interests demand at that particular time and under these peculiar circumstances. Acts and statements that would seem disingenuous, or even *culpably misleading in other relations of life, are pardoned in a professional advocate, because of his necessary attitude toward his client and toward the enemy.* There is every reason, therefore, why the oral statements of counsel upon a judicial inquiry of any sort, no matter what their purport may be, should not be taken as solemn admissions of fact which the client may not afterwards gainsay."

If we are right in our position that this evidence is not admissible, and should be disregarded by this Court upon this appeal, then it seems to follow that there is no evidence sufficient before the Court from which to infer the ground upon which the order of October 31, 1876, was decided, and therefore there is no evidence from which it can be said that that order determined the validity of the judgment of November, 18, 1873; but we have already shown that, even with this evidence, there are several grounds upon which said order might have proceeded, and therefore it can in no way operate as *res adjudicata* of the said judgment.

It is, of course, true that when the record does not disclose the precise point decided, resort may be had to extrinsic evidence.

That *oral arguments* of counsel are *inadmissible* on *such* evidence the cases cited clearly show.

(*E*). SUCH AN ADJUDICATION AS WAS MADE BY THE ORDER, IF IT BE *res adjudicata*, IS ONE NOT BINDING ON COURTS IN THE STATE OF NEW YORK.

Admitting, for the sake of argument, that the

order of October 31, 1876, is res adjudicata of the validity of the judgment, it was an erroneous decision and does not estop Davis from denying the validity of the judgment in the present action.

The only question before the court on the motion was the effect of the *admitted* fact. The fact itself was not drawn in question and determined.

The Constitution of the United States provides in Article IV, Section 1, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

Suppose A had sued B upon a promissory note in California in 1875, prior to the decision of this Court in *Pennoyer* v. *Neff*. B was in 1875, and ever since has been, a non-resident of, and not domiciled in, California; no personal service of summons upon B was ever had, he never appeared in person or by attorney, no attachment or process *in rem* was ever issued or levied in the action. Suppose that, under the law then existing in California, the summons was served upon B by publication, and judgment was finally entered in favor of A and against B.

This judgment, it is agreed, is void under the decision in *Pennoyer* v. *Neff*, 95 U. S., 714, both in and out of California.

Now suppose further, that in 1885 A sued B upon said California judgment in the State of Pennsylvania, and that B appeared and set up the want of jurisdiction in the California court to grant said judgment, and that, therefore, it was void. The Pennsylvania court, however, erroneously decided that the California judgment was not void, but was valid, and gave judgment against B, from which judgment B has never appealed, and which judgment is entirely unsatisfied and still of record.

Now suppose further, that to-day A catches B, who has since 1885 become rich, in the State of New York, and sues him upon said California judgment

in New York. B sets up the want of jurisdiction in the California court to grant said judgment, and claims it to be void. A, however, replies that in 1885 he sued B upon the said judgment in Pennsylvania; that B in that suit set up the same defense, and that the Pennsylvania court decided against B and entered judgment against B, and that said Pennsylvania judgment is still unreversed and in full force, and estops B from claiming the California judgment to be invalid.

Would the New York court hold B estopped by the Pennsylvania judgment, and refuse to decide for itself the validity or invalidity of the California judgment?

To our minds the statement of such a proposition is its own best refutation. It certainly would lead to a startling result; for it would, through the doctrine of estoppel, enable any one State in the Union to determine for every other State, by an erroneous decision, the validity or invalidity of a judgment of any given State, and practically nullify the provisions of the Constitution.

We do not believe that this doctrine of estoppel can be carried to any such extent. Each State is made the judge for itself as to the validity of the judgments of other States, unhampered by any doctrine of *res adjudicata* or estoppel by prior adjudication of other States.

The case supposed is precisely the case at bar, if we assume with appellee that the order of October 31, 1876, adjudicated that the judgment of November 18, 1873, was valid.

On that assumption in 1876, the U. S. District Court in bankruptcy decided that the judgment of November 18, 1873, given by the California court against Davis was valid. The decision of that fact was erroneous. That is admitted by counsel.

Now H. P. Wakelee's successor in title to the California judgment sues Davis in the State of New York in the United States Circuit Court, Southern

District of New York, and claims that by reason of the erroneous decision of the United States District Court for the District of California in 1876, Davis is estopped to assert in the action in New York the invalidity of the California judgment.

In other words, the United States Circuit Court in New York is denied the privilege of deciding for itself what faith and credit should be given to the California judgment, because, forsooth, Davis is estopped to raise the question by an erroneous decision of the United States District Court in California.

We submit that our position in this regard is impregnable. That there is nothing in the steps which lead up to the order of October 31, 1876, to constitute an estoppel by record.

A judgment of a sister State can always be impeached for want of jurisdiction over the person when the judgment is being sued on in another State.

Point VI.

There is no estoppel *in pais*.

This is true, because all of the elements of an estoppel *in pais* are lacking in this case.

1. Davis did not assert the validity of the judgment.

2. The representations were of law.

3. They were true.

4. The facts were known to both parties.

5. They were not intended to mislead.

6. Wakelee had no right to rely on them.

7. The statements were *ex parte*.

8. They were not relied upon.

9. Davis obtained no benefit.

10. Wakelee suffered no detriment.

We shall consider these various reasons in the order in which they have been set forth.

The various elements of estoppel *in pais* are well described in Pomeroy's Equity Jurisprudence, Sec. 805. They are as follows:

1. There must be conduct amounting to a *representation* or a concealment of material *facts*.

2. These facts must be known to the party estopped at the time of his conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him.

3. The truth concerning these facts must be *unknown* to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him.

4. The conduct must be done with the *intention*, or, at least, with the expectation that it will be acted upon by the other party.

5. The conduct must be *relied* upon by the other party, and, thus relying, he must be led to act upon it.

6. He must, in fact, *act* upon it in such a manner as to change his position for the *worse*.

1. We will take up the first element of estoppel, which is, "There must be conduct amounting to a *representation* or a concealment of material *facts*."

(*a*.) Davis did not assert the validity of the judgment. The most that can be said in opposition to this statement is found in the petition on which Davis moved for an order cancelling the proof of debt, and to disregard the specifications of opposition filed by Wakelee. The petition states the facts attending the entry of the judgment, and its concluding words are as follows: "Which said judgment still stands of record in the said Fifteenth District Court, and is in full force."

It cannot for a moment be contended that a statement of this kind is asserting the validity of the judgment in question, which was a void judgment. The statement is a true statement. The judgment was "in full force" until set aside. It is also a legal conclusion merely.

It is argued that that was an open and binding admission of its validity.

In the case of *Borst* v. *Corey*, 16 Barb., N. Y., 136, the plaintiff married one Martin Borst, and entered into an anti-nuptial agreement by which $1,300 was set apart for her separate use. Afterward the plaintiff, the said Martin Borst, and one Corey, as trustee, entered into a writing under seal for the payment of said sum. Plaintiff's husband died, and she brought an action against Corey to recover the said sum. The instrument under seal was introduced in evidence, containing the following recital:

> "Whereas, a marriage, having been solemnized between said Martin and Rachel, and it having been agreed before said marriage between said parties thereto, that the same $1,300, the gross amount of said Rachel's right of dower in the real estate, etc., shall be secured to her separate use and manner as is hereinafter provided."

The Court held that the agreement was not binding upon the defendant, and that notwithstanding the recital in the agreement, under seal, he was not estopped from denying the binding effect of the instrument. The Court says: "A mere recital never concludes the party; *there must be a direct affirmation*" (Co. Lyt. 352 B.).

This case stands on all fours with the one at bar. The petition simply contained a recital that a judgment had been entered, but the record fails to reveal, in the slightest degree, evidence that Davis ever affirmed the validity of said judgment.

In the case of *Ostrander* v. *Campbell*, 20 State Reporter, 806, it was held that the setting up of a judgment as a bar to an action did not estop the defendant afterwards from appealing from the same judgment for the purpose of reversing it as erroneous, notwithstanding the fact that he moved upon it.

Davis had no reason to suppose that the judgment was invalid. Every one in California then considered that such a judgment was valid.

How, then, could Davis assert or affirm or adopt the judgment? This pre-supposes that Davis and every one else believed that the judgment was invalid, and, in spite of this, with a knowledge of this fact, Davis deliberately waived its invalidity and agreed to be bound by it.

Such was not the fact nor could it possibly have been at that time in the mind of any one.

(*b*). The representation made by Davis, if any, was not of a material fact. It was a representation of law.

It becomes necessary at this point to examine into the alleged admissions and ascertain whether they were admissions of fact, or conclusions of law. We contend that they were the latter, in which event they could not constitute grounds for an estoppel *in pais*.

It is alleged in paragraph 32 of the amended bill, that Wakelee accepted the assurances of Davis, "That said judgment was valid and binding on him, the said Davis, and that the same would not and should not be barred or in anywise affected by any discharge in bankruptcy of said Davis in said bankruptcy proceedings."

Admitting, for the sake of argument, that such representations were made, there can be no doubt that the force and effect of said judgment, or the effect which a discharge in bankruptcy could have upon it is a question of law.

That an admission of an opinion or a statement of law, forms no basis for an estoppel is clearly shown in the following authorities:

In the case of *Wilmore* v. *Flack et al.*, as executors, &c., 96 N. Y., 512, it appeared that on February 13, 1875, plaintiff recovered a judgment in the Marine Court of New York City against one Levy, and issued execution to the defendant, Hillier, a marshal of New York City, who levied upon property belonging to the judgment debtor sufficient to satisfy the same. William C. Conner, Sheriff of New York County, took said property from Hillier, and converted it to his own use. The plaintiff being about to sue Hillier for neglect to satisfy his execution, and permitting Conner to take the property, was induced by Hillier (he having previously given Hillier a bond of indemnity against the claim of Conner to the property) not to sue, but to permit Hillier to bring an action for plaintiff's benefit against Conner for the conversion. This action was brought and resulted in a judgment for the plaintiff, which was reversed on an appeal to the General Term of the Marine Court, that court granting a new trial. Hillier appealed to the General Term of the Court of Common Pleas, but gave no stipulation that judgment absolute might be rendered against him in the event of affirmance. The Court of Common Pleas af-

firmed the order below, and rendered judgment absolute in favor of Conner, dismissing Hillier's action with costs. A remittitur was sent from the Common Pleas to the City Court and judgment thereon was rendered.

Under the law then existing, in order to give the General Term of the Court of Common Pleas any jurisdiction to hear the appeal, the appellant was required to stipulate that in case of affirmance judgment absolute should be entered against him. The result of the failure of Hillier to give the stipulation, was that the action of the Court of Common Pleas in hearing the appeal, and in awarding judgment absolute, and the action of the Marine Court in entering judgment upon the remittitur was absolutely void.

An attempt was made by Hillier, on motion, to set aside the judgment so entered, in order that he might have the new trial which had been awarded by the General Term of the Marine Court, but this was denied. The plaintiff being responsible by reason of having indemnified Hillier, began suit in equity to set aside the judgment entered upon the remittitur on that ground that it was absolutely void, and the Court of Appeals held that he was entitled to maintain this action. *One ground taken by the defendants was that the plaintiff was estopped from bringing the suit, on the ground that Hillier, by appealing to the Court of Common Pleas, was estopped from denying that the General Term of that Court had jurisdiction to hear the appeal and to award the judgment of affirmance.*

The Court of Appeals say, Finch, J.:

> " Nor is the plaintiff estopped from raising the question of jurisdiction. His consent to its exercise could not confer it (*McMahon* v. *Rauhr*, 47 N. Y., 67). If it did or could, it is still true that the appellant did not consent to the jurisdiction assumed. He misled nobody. All parties acted in good faith on the appeal, and under a common mistake of the

law. *The respondents and the Court had no right to rely upon the appellant's interpretation of the Act of 1875. Each was quite as much bound to know and recognize the lack of jurisdiction as the appellant himself.*"

"*At the bottom of an estoppel lies either a fraud or something which operates as such. Here there was none, but simply an honest mistake, for which each party and the Court were equally responsible.*"

In the case of *Whitwell* v. *Winslow and ano.*, 134 Mass., 343, plaintiff brought an action against Isaiah B. Winslow and Frederick Winslow upon the following instrument signed by Isaiah and endorsed by Frederick Winslow: "Fall River, June 29th, 1872. For value received, I promise to pay to Elijah Pierce or bearer $500, with interest, the same as savings banks pay."

On the trial the plaintiff offered the instrument declared upon in evidence, and the defendants asked the Judge to rule that the instrument was not a promissory note, and that if it was, it was not negotiable, and the plaintiff could not maintain an action thereon in his own name. The plaintiff offered to show that when Frederick Winslow gave the instrument to the plaintiff, the plaintiff told him it should be in his name, or to his order, and that Frederick replied, "It is all right; it makes no difference; it is payable to bearer and you can collect." The Judge ruled that the instrument was not negotiable, and the plaintiff could not maintain the action in his own name thereon, and that the offer of evidence of the plaintiff was incompetent and immaterial. Upon a bill of exceptions, the Supreme Court says, per Field, J.:

"The rejection of the evidence of what Frederick Winslow said to the plaintiff at the time he gave the note to him, so far as it was offered for the purpose of varying the effect of the instrument, was right. Neither could the evidence offered, if true, operate as an estoppel to prevent Frederick from contend-

> ing that the plaintiff could not maintain in his own name an action on the instrument. If the statement made by Frederick was false, and was made by him with the intention that the plaintiff should act upon it, and the plaintiff was thereby induced to accept the instrument, still it was a statement of *an opinion upon a question of law* where the facts were equally well known to both parties."
>
> See also *Clay* v. *Dist. of Buchanan*, 63 Ia., 188.

It will be hard to find a statement of law more applicable to the present case. It is plain beyond question, "that all claims, declarations and admissions" made by Davis or his counsel, were merely statements of the opinions of counsel upon questions of law, and that the facts were equally known to both parties, and it follows as clearly as the day, the night, that under the rule laid down in the cases last quoted that it is impossible to hold that the defendant Davis, or his counsel, are estopped by any claims, declarations or admissions made on the argument of the motion, no matter what reliance was placed upon them by the plaintiff. All the facts were set forth in the petition, and all of them were equally well known to both parties, and the plaintiff had no right to rely upon the statements of law made by the defendant's counsel, and if she did, or if her assignor did, so that injury resulted, she did it at her own peril, and must bear the consequences.

If the plaintiff had no right to rely upon the declarations or admissions of the defendant's counsel, and yet did so to her injury, she has no right to claim that the defendant is estopped. The mere fact that a party has relied upon admissions or representations, and has been injured, is no test of the question whether the defendant is estopped or not. She must have had a right to rely upon them in order to create an estoppel. This is shown clearly

in the case of *Howe Machine Company* v. *Farrington*, 82 N. Y., 121.

All the essential elements of an estoppel are here lacking. The admission of the defendant was the admission not of a fact, but of an opinion or proposition of law. In the second place, even if the admission were an admission of fact, it was a fact the falsity of which was as well known to Wakelee and his attorneys as to the defendant and his attorney. Moreover, it was not made with the intent that the plaintiff should rely upon it, nor under circumstances calculated to show that a person of ordinary discretion would rely upon it. In the same way as Judge Field well said in the case of *Whitehall* v. *Winslow and another*, *supra*, so in this case, even if the statement made by defendant's counsel was false, and was made by him with the intention that it should be acted upon by plaintiff's assignor, and plaintiff's assignor was thereby induced *not to appeal*, still it was a statement of an opinion upon a question of law where the facts were equally well known to both parties. To the same effect is *Brewster* v. *Striker*, 2 N. Y., 19.

Moreover, there could have been no intention to deceive on the part of Davis in representing the judgment of November 18, 1873, to be valid. Davis, in common with every one else in California at that time—that is, in 1876, supposed that said judgment was a valid judgment, and the courts of California at that time would have enforced it as of a valid judgment.

If that representation was false, it was not known to Davis at the time to be false, nor was it a case where he represented something to be true which he did not know to be true, and should have known to be true. There can, therefore, have been no intention on Davis's part to mislead, and, therefore, there was lacking an essential element of an estoppel *in pais*.

In the case of Kinnier *v.* Kinnier, 45 N. Y., 535, at p. 539, Ch. J. Church says:

> "It is true that the complaint states that an answer not replied to is taken as true, according to the laws of the State of Illinois and the practice of the Court, and in consequence thereof said Court could not entertain jurisdiction of said case. *It is also alleged in general terms that the judgment was* VOID *in the State of Illinois.* These are statements of *law* and not of *facts*, and the sufficiency of a pleading is to be determined by *facts* stated, and *not by conclusions of law* averred, and the *facts* only are deemed to be admitted by a demurrer."

We hardly think counsel will distinguish this case from the one at bar on the ground that a complaint differs from a petition, or on the mere difference of language. *If an allegation that a judgment is* VOID *is an allegation of* LAW, *then surely an allegation that a judgment is in full force is equally an allegation of law, and it makes no difference that one is made in a complaint while the other is made in a petition.*

2. We will now take up the second element of estoppel, which is: "These facts must be known to the party estopped at the time of his conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him."

The representations were not untrue. The judgment was obtained in a California court in 1873. The representations were made in July, 1876, and the order was made in October, 1876. At that time, under the case of *Hahn* v. *Kelly*, 34 Cal., 301, such a judgment was held to be valid. It was not until 1877 that the Supreme Court held such a judgment to be void.

How, then, could Davis or his counsel know that the representations were untrue? How could Davis

or his counsel know the fact to be other than it was represented to be?

3. We will now take up the third element of estoppel, which is as follows: "The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him."

The facts concerning the validity of this judgment were known to both parties, and, if anything, were more within the knowledge of Wakelee than they were within the knowledge of Davis or his counsel.

The party claiming the benefit of the estoppel must be ignorant of the truth both at the time of the representation and also at the time when the representation is acted upon by him.

2 Pomeroy's Equity Jurisprudence, Sec. 810, Notes 3 and 4.

We maintain that there was no misrepresentation as to the facts, and that Wakelee's knowledge, both as to the facts and law relating to the judgment, were as full and complete as those of Davis.

Wakelee procured entry of the judgment of November 18th, 1873. He had every means that Davis possessed of knowing the force and effect of this judgment. He did not then, and does not to-day, dispute the fact that that judgment did not, at the time the motion was made, stand of record and in full force. He knows it to be a fact. Under these circumstances there can be no estoppel.

In *Hill et al.* v. *Epley et al.*, 31 Pa. St., 331, the rule is stated as follows: "That if the truth be known to both parties, or, *if they have equal means of knowledge, there can be no estoppel.*" Accordingly, it was held that one did not rely upon representations who had the means of becoming acquainted with the extent of his rights.

See also *Dist. Twp. of Clay* v. *the District of Buchanan*, 63 Iowa, 188.

The plaintiff has previously brought an action against the same defendants and by reason of the answer interposed upon that occasion, suffered judgment against him. He brought another suit upon the same cause of action, and averred in his complaint that the defendant was estopped from denying the validity of the prior judgment. The Court say, at page 192:

> "Whatever position the defendants took in that action respecting the validity of the judgment, it seems *to us was a mere legal position of the soundness of which the plaintiff could judge as well as the defendants.*
>
> We see no ground upon which an estoppel can be based."

To the same effect is *Brant* v. *Virginia Coal and Iron Co.*, 93 U. S., 326. It has well been said: "That at the bottom of an estoppel lies either a fraud or something which operates as such." We maintain that the acts relied upon by Wakelee in the present case to constitute an estoppel are absolutely devoid of fraud.

In this connection it cannot be amiss to examine the parallel which at one time was instituted by counsel for the appellee between this case and the well-known case of *The Phila., Washington and Baltimore R. R Co.*, v. *Howard*, 13 How., 307, and which he has heretofore argued before this Court.

That case is a leading one in the doctrine of estoppel *in pais*. It was an action of covenant brought by Howard against the Phila., Wash. and Balt. R. R. Co. The plea was *non est factum*.

The defendant railroad was the successor of the Wilmington and Susquehanna R. R. Co. On July 12, 1836, a contract was entered into between that company and Howard for the prosecution of the work in Cecil County, Md. Two copies of this paper were extant. They were substantially alike except in this, that one of them was sealed by Sebre

Howard, and was signed by James Canby, president, with his private seal affixed. It was not sealed by the railroad company. The other was signed and sealed by Howard, and signed also by Canby as president. It also bore an impression which purported to be the seal of the company.

The latter paper was the basis of the present suit. Howard was proceeding in the construction of the road, when the company declared the contract forfeited.

An action of *assumpsit* was then brought by Howard against the Wilmington and Susquehanna R. R. Co., in Cecil County Court, Md. In said case the plaintiff Howard relied upon the first contract mentioned above, which did not purport to be sealed by the railroad company. There was evidence in this case tending to show that at the trial of said action of *assumpsit* one of the defendant's counsel in that action had in his possession the second contract above mentioned (which purported to be sealed by the railroad company), and handed said paper to the Judge as the real contract in the case, and spoke of it as the real and genuine contract between the parties; that said contract was offered in evidence by defendant as the deed of said company, and that evidence of the fact that it was such deed was offered by said defendant; and plaintiff's attorneys, satisfied by the production and proof of said last contract as the sealed deed of the defendant that said suit could not be maintained, suffered a verdict to be taken for the defendant.

This evidence was objected to and admitted under exception.

The Court below instructed the jury as follows: "If the jury find from the evidence that this instrument of writing was produced in court and relied upon by the present defendant as a contract under the seal of the Wilmington and Susquehanna R. R. Co., in an action of *assumpsit* brought by Sebre and Hiram Howard against the last-men-

tioned company in Cecil County Court, and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of said sealing, because such a defense would impute to the present defendant itself a fraud upon the administration of justice in Cecil County Court."

Curtis, J., says, in discussing the exception to this instruction, at p. 336:

> "It is further objected that the facts supposed in the instruction do not amount in law to an estoppel. We think otherwise."

He then discusses certain authorities, and proceeds as follows:

> "These decisions go much further than this case requires, because the defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil County Court by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law that when a party asserts what he knows is false, or does not know to be true, to another's loss and his own gain, he is guilty of a fraud—a fraud in fact if he knows it to be false, a fraud in law if he does not know it to be true."
>
> "Certainly it would not mitigate the fraud if the false assertion were made in a court of justice and a meritorious suit defeated thereby. We are clearly of opinion that the defendant cannot be allowed to say that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable to hold that the representation which defeated one action on a point of form should sustain another on a like point."

The precise question involved in the case cited is apparent. The action was covenant, the plea *non est factum*, and the plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington and Susquehanna R. R. Co., defendant's predecessor. To prove this fact, he offered evidence that the Wilmington and Susquehanna R. R. Co., through its counsel, had represented the instrument as bearing the corporate seal of that company, and that he, relying upon said representation, had suffered a verdict to be taken for the defendant in the action of *assumpsit*, and also had, in reliance thereon, begun the present suit.

Here, surely, was a perfect case of estoppel *in pais*. The fact whether the seal borne by the instrument in question was or was not the corporate seal depended upon the question whether said seal was or was not affixed by the authority of the railroad company. That was a fact resting peculiarly in the knowledge of the *company* and its officers, and *not* known to the plaintiff. The representations, therefore, that the impression of the company's seal had been made by authority of the company was a fact which plaintiff had a right to rely on and a fact not in plaintiff's knowledge. He did rely on it to his detriment; that detriment was two fold: (1). He was induced to suffer verdict in favor of defendant in the first suit; (2). He was induced to begin the second suit.

Here was a representation made with the intention of being relied on, known to defendant to be false, or at least not known to be true; supposed by plaintiff to be true, and relied upon by plaintiff, to his detriment—a perfect estoppel *in pais*.

In the present case Davis asserted that the judgment of November 18, 1873, was a judgment "standing of record, and in full force.

There is no dispute but what in 1876, under the decision of *Hahn* v. *Kelly*, 34 Cal., 391, the courts

of California would have held said judgment a judgment "in full force," and would have enforced it by execution or otherwise.

The case of *Pennoyer* v. *Neff*, 95 U. S., 714, was not decided till October, 1877, and the California courts did not reverse their views until *Belcher* v. *Chambers*, 53 Cal., 635, decided in 1879.

Now in this particular case the question whether the judgment of November 18, 1873, was or was not "in full force" was a question of which Wakelee knew just as much as Davis. Wakelee obtained said judgment against Davis. He knew every step taken to obtain it, and he knew quite as well as Davis all the requisites to make a judgment "in full force."

Therefore, in representing to Wakelee that said judgment of November 18, 1873, stood of record, and was in full force, Davis was not representing a fact peculiarly in his own knowledge and presumably unknown to Wakelee.

In this respect there is a vital distinction between the case of *The Phila., Wash. and Balt. R. R. Co.* v. *Howard*, *supra*, and this case. There the representation was a representation of something peculiarly in the knowledge of the party making the representation, namely, whether the impression of the company's seal had been made with the authority of the company or not.

There is, therefore, this vital distinction between the cases.

4. We will now take up the fourth element of estoppel, which is as follows: "The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party."

Davis did not intend that any representation with respect to the judgment should be acted upon. There was no reason to suppose that it would be. We have shown that the statement was merely one

of law; that the facts about the validity of the judgment were known to both parties; no one supposed that the judgment was not valid; it was assumed that it was; and no one was at fault at that time in supposing, as they did, that the judgment was in full force and wholly valid. In fact, the other side had entered the judgment, and presumably was satisfied with it.

5. We will now take up the next element of estoppel, which is as follows: "The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it."

Now, as a matter of fact —

(*a*). Wakelee had no right to rely upon these representations.

(*b*). They were mere *ex parte* statements.

(*c*). As a matter of fact, they were not relied on at all.

(*a*). Wakelee had no right to rely on these representations. This follows from what has already been said. They were not representations of something peculiarly within the knowledge of Davis; the facts were known to Wakelee; there was no concealment or reservation of any fact; they were not such representations as either were intended to be relied upon or which a party could safely rely upon.

Howe Machine Company *v.* Farrington, 82 N. Y., 121.

(*b*). Again, the statements were mere *ex parte* statements.

Under the doctrine of Election of Remedies Wakelee had no legal standing before the bankruptcy court to oppose Davis's discharge, and

all statements and representations made by Davis were, therefore, virtually ex parte statements, and insufficient to constitute a basis for the application of the doctrine of estoppel.

It is unquestionable that Wakelee had two remedies, one in the bankruptcy court and one by bringing suit at law on his claims. He started with the first of these remedies, and abandoned the same, and the order permitting him so to do was virtually a dismissal of the proceedings in bankruptcy, considered in the light of his petition. After this abandonment he brought suit at law on his claim, and entered judgment, and was pursuing this remedy at the time Davis filed his petition for a discharge (Record, fol. 177). So far as the legal status of Wakelee was concerned in the proceedings in bankruptcy, there can be no doubt that he had no standing to oppose Davis. As Chancellor Kent says, in *Sanger* v. *Wood*, 3 Johns. Ch., 416:

> "Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting and inconsistent remedies."

And there are innumerable decisions holding that if one determines his election, it shall be determined forever, among which are *Fowler* v. *The Bowery Savings Bank*, 113 N. Y., 450; *Cobb* v. *Knapp*, 71 N. Y., 348; *Bank of Beloit* v. *Beal*, 34 N. Y., 473; *Riley* v. *Albany Savings Bank*, 36 Hun, 513, affirmed in 103 N. Y., 669; *Moller* v. *Tusca*, 87 N. Y., 166; *Andrews* v. *The Life Insurance Company*, 92 N. Y., 596.

Wakelee first abandoned his standing in the bankruptcy court and was then dismissed. When Davis came to file his petition of discharge, Wakelee illegally forced himself before the court and, had he been allowed standing therein, would have subjected Davis to great inconvenience and expense before he could have obtained his discharge. Therefore, the statements of Davis—Wakelee having no

legal standing in court—were virtually *ex parte* statements and representations, which can never constitute the basis for an estoppel.

(*c*). Again, these representations were, as a matter of fact, not relied upon at all.

This requisite of estoppel *in pais* goes to the very bottom of plaintiff's case. Before taking up the allegations which plaintiff sets up in support of this requisite, let us pursue further the parallel instituted in the case of *The Phila., Wash. and Balt. R. R.* v. *Howard*, in which a more vital distinction can be drawn than we have heretofore alluded to. In the Howard case, Howard relied upon the representation and suffered detriment from such reliance: (1). He was induced to permit a verdict in the first suit in favor of the defendant; (2). He was induced to begin the second suit. He did each of these things in reliance upon the representation.

In *Jewett* v. *Miller*, 10 N. Y., 402, Johnson, J., says:

> "It is hardly necessary to say that equitable estoppel never takes place unless the party seeking to avail himself of the estoppel has actually been misled. It is not sufficient to say that he might have been misled, if in point of fact he has not relied upon the acts or representations of the other party. The doctrine is highly equitable in its nature, and is never available to enable a party to gain an advantage upon the unfounded grounds that he has been defrauded."

Now, what has Wakelee done in reliance upon Davis's representation that the judgment is in full force, and that the discharge in bankruptcy would not affect the judgment in question? Nothing, *absolutely nothing!* Why should he do anything? The decision in *Hahn* v. *Kelly*, 34 Cal., 391, was still in force and at the very time of the motion there was a suit pending in England on this very judgment, in the course of which property of Davis

had been *attached* (Rec., fol. 136), and Davis, at this time, was worth not less than one hundred thousand dollars (Rec., fol. 62). Assuredly, there was no need for Wakelee to do anything, happy in his apparently well founded expectation of collecting the judgment. He was content with the result of the motion. To be sure, his attorney says, "We did everything that was proper to be done" to prevent the entry of the order. "Everything that could be done in a court of justice to present both sides was done" (Rec., test. of Naphtaly, fol. 130). But still the outcome was satisfactory. In fact, Wakelee and his attorneys were apparently exultant over the result, because "it was a pretty good thing to have a judgment against Erwin Davis, because he was a man of great talents and ability to make a great deal of money and a man of vast resources, and that suited" (Rec., fol. 129). "The resources of Mr. Davis were so great, and he was a man of such great activity of mind and intellect, that he would not rest a poor man, and that sooner or later he would get up in the world again and pay his debts, and Mr. Barnes *was satisfied with the decision of the Court*" (Rec., fol. 130). Out of the mouths of Wakelee's own attorneys came words fatal to the application of the doctrine of estoppel.

Representations must be believed and relied upon.

> 2 Pomeroy's Equity Jurisprudence, Sec. 812, Note 3.

It should be noted that the bill does not claim, as the basis of the estoppel, that complainant was prevented by the order from a further opposition to the discharge. The only ground is that Wakelee was prevented from *appealing*.

Both counsel argued on different sides of the question, and, furthermore, the representations were made long before the time when the bill claims they were relied upon. The bill only claims that reliance was placed upon them

after the order was made. Now, the only time when any reliance could have been placed on the representations was at the argument. All the evidence shows that Wakelee and his attorneys did not rely on these representations at all. They argued wholly on the other side of the question (fols. 117–119; fols. 128–131).

6. When we consider the last element of estoppel, the facts in this case will not fit it.

This element is as follows: "The party must, in fact, act upon the representation in such a manner as to change his position for the worse."

(*a*). Now, in the first place, Davis obtained no benefit by any representation.

It becomes necessary here to examine closely into the proceedings which resulted in the order of October 31, 1876, to ascertain just what benefit, if any, accrued to Davis from said proceedings, and whether said benefit is of the character requisite to support an estoppel. The court below held that it was. The facts and the action of Wakelee, reviewed in their entirety, reveal clearly that this position is wholly untenable.

We base our argument here upon the *proposition that Wakelee was not in a position to oppose Davis's discharge in bankruptcy, and that for the act of Davis in defeating Wakelee's attempt to harass him, no court in the land will impose a penalty.*

Sec. 5106 of the Revised Statutes reads:

> "No creditor, whose debt is provable, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of dis-

> charge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided also that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

Sec. 32 of the Bankruptcy Act provides that certain claims shall not be discharged by discharge in bankruptcy. The language of Sec. 5106 is direct and positive. That the maintenance of suits at law upon claims provable in bankruptcy proceedings, pending said proceedings, was looked upon as an attempt to harass the bankrupt, is illustrated by the whole theory of the Bankruptcy Act, as well as by the numerous remarks of many judges found in the decisions in Bankruptcy Reports, denying the petition of creditors for leave to sue.

Wakelee had voluntarily abandoned his position in the Bankruptcy Court. Ample evidence on this point is found in his petition for leave to sue, as well as in the testimony of his attorneys. His petition for leave to sue is found at fols. 59-63 of the Record. At fol. 61 he states:

> "Your petitioner has been informed and believes, and charges the fact to be, that, except a small amount of personalty of little value surrendered to the said assignee by said Davis, all his property was encumbered by mortgages and liens of various descriptions, amounting to much more than the value of the same; * * * * There will be, as your petitioner is informed and believes, and therefore charges on such information and belief, *no assets or other thing from said property to be distributed among such creditors as himself.*
>
> That the property of said bankrupt which came to the hands of the said assignee *is wholly insufficient to discharge the liens and encumbrances thereon and the costs of the proceeding in bankruptcy*, and that your petitioner's claims are wholly due and unpaid."

The real motive which actuated Wakelee in abandoning his standing in the bankruptcy court and in endeavoring to sue on said claims, is revealed at fol. 62 of the Record, being a part of said petition:

> "That your petitioner is informed and believes, and therefore charges the fact to be, that since the filing of his said petition in bankruptcy, *said Davis has acquired a large amount of property and estate in the State of New York and elsewhere, of the value of not less than one hundred thousand dollars, which is held by him in his own name and right, or by others whose names are unknown to the petitioner but in trust for him; that all or most of said property can be reached by requisite proceedings and subjected to the payment of your petitioner's just claims and demands;* that your petitioner's claims and demands above mentioned will be barred by the Statute of Limitations in force in the State of New York, where said Davis is now reputed to reside, unless he shall speedily commence proceedings there against said Davis, and he will, therefore, be unable to enforce the payment thereof in the State of New York or from instituting the proper proceedings to reach the said bankrupt's estate. Wherefore, your petitioner prays that leave may be granted him to enforce the collection, payment and satisfaction of the said claims and demands, and for such purpose to institute and maintain all requisite and necessary actions and suits at law and equity against said bankrupt Erwin Davis, as he may be advised in any court or courts, in any State or country, having jurisdiction of the person or property of the said Erwin Davis," &c. (Record, fols. 62–3).

There can be but one explanation of the proceedings had in California, in view of Judge Hoffman's decision in *In re Ghiradelli*, 4 N. B. R., 164.

Under this decision the order of October 31, 1876, would never have been granted, *except upon the*

plain and unmistakable evidence found in Wakelee's petition that he had abandoned all proceedings in the bankruptcy court at the time he asked for leave to sue, and sought thus to enforce payment of his demands out of the fortune which he believed Davis had acquired in the State of New York, and by filing his opposition to Davis's discharge he was simply endeavoring to harass Davis. He had voluntarily taken himself out of the bankruptcy court, and he had no right to oppose Davis's discharge.

Davis applied for his discharge. Wakelee filed specifications of objection to the said discharge (Record, fols. 68-71). Davis pursued the only course that was open to him to defeat this unwarranted attempt on the part of Wakelee to harass him after Wakelee had abandoned his proceedings in bankruptcy, and made a motion to cancel the proof of indebtedness and to disregard the specifications of objection (Record, fols. 71-4). Prior to this time Wakelee had entered his judgment, and, at the very time when the motion was made to disregard the objections, he was endeavoring to enforce the collection of said judgment both in England and in France, where property had been attached (Record, fol. 136).

It is now contended, on behalf of the defendant in error, that, as a *penalty* for pursuing this course, which was the only one open to Davis to preserve his rights, that the Court shall hold that Davis is precluded from denying the validity of the judgment, and from setting up his discharge in bankruptcy, and that, as a *reward to Wakelee* for pursuing his inequitable tactics, the Court shall decree that Davis pay to Wakelee the amount of the judgment. One of the priceless maxims of our law is, "equality is equity." In the present attempt of Wakelee's assignee there is neither equality nor equity. Had Wakelee chosen to accept the benefits of other creditors under the bankruptcy proceedings and remained in the bankruptcy court, it is probable that some portion, at least, of his claim would have

been paid. It is one of the misfortunes in this world that man's speculations do not always realize according to expectations, but that each may stand on the same basis, and have an equitable settlement of their claims, was the very purpose for which the Bankruptcy Act was designed. On the other hand, Wakelee might have refused to have participated in the funds to be distributed in the bankruptcy court, and endeavored to enforce the entire collection of his claim at law. It is apparent this was his intention when he filed his petition for leave to sue, but nothing can be more contrary to the spirit of the Bankruptcy Act, or contrary to justice, than permitting Wakelee to pursue both courses at the same time. This was what he endeavored to do when he filed the specifications of objection, and is what his assignee now is endeavoring to do. We do not believe that the Court will assist her in this endeavor.

Wakelee elected his remedy outside of the bankruptcy court.

(*b*). In the second place, Wakelee suffered no detriment whatsoever.

It remains for us now to consider this last requisite of an estoppel *in pais* to ascertain in what degree the plaintiff has brought herself within its application. In order to bring herself within its requirements, it must be shown conclusively that Wakelee suffered some detriment by reason of his relying upon some representations made by Davis upon which he had a *right to rely*, and that these representations were such that it is inequitable now to allow Davis to retract.

We believe that we have shown, first, that Wakelee never relied upon any of the representations made by Davis. He did not appeal, not because he believed Davis's statements were true, *but because he was satisfied with the decision of the Court* (Rec., fol. 130).

It is well settled law that no man has a right to rely upon an opponent's interpretation of the law, and that if he does, it is no basis for an estoppel, because both parties have equal opportunity to know the law.

It also clearly appears that the cancellation of the proof of claim in bankruptcy proceedings *was not primarily the act of Davis, but was the result of Wakelee's own act*, brought about by no influence of Davis whatever, but carried to the end by Wakelee, after abandoning his legal standing in the bankruptcy court, with the clear intention by so doing of obtaining for himself an advantage which he feared he would not have in the bankruptcy proceedings, and with the hope that the business ability of Davis would eventually enable him to realize upon his judgment.

There is nothing in the record which even *suggests* that the order of October 31, 1876, was detrimental to Wakelee. Did he lose his distributive share of the proceeds of Davis's estate? *The Record does not show that there was ever a dollar distributed to Davis's creditors.* Taking the statements of Wakelee, it is presumable that there was nothing to distribute. He says:

> "There will be, as your petitioner is informed and believes, and therefore charges on such information and belief, no assets or other thing from said property to be distributed among such creditors as himself; that the property of said bankrupt, which came to the hands of the said assignee, is wholly insufficient to discharge the liens and encumbrances thereon and the costs of the proceedings in bankruptcy" (Rec., fol. 61).

Under these circumstances what detriment came to Wakelee? At the time of the decision he did not consider that it was detrimental to him. *He was satisfied with the decision of the Court!* (Rec., fol. 130.)

Illustrative of this position is the case of Dater *v.* Wilson, 36 Hun, 546.

The plaintiffs presented to the Surrogate their verified petition, describing themselves as legatees named in the will of one F., and praying for its probate. They produced the subscribing witnesses, proved the execution of the instrument which was thereupon admitted to probate, and the executor entered upon the discharge of his duties. The plaintiffs were present when the will was executed and well knew of its conditions and all the facts and circumstances connected with the proof before the Surrogate. They acted in good faith. Subsequently, however, they learned that the will was worthless and brought their action to set aside the document. The case was tried before a Referee, who held upon the facts that the plaintiffs were estopped from denying the validity of the will. Upon appeal the judgment was reversed, the Court holding that there was no estoppel, either of record or *in pais*.

The Court says:

> "Admitting the fact that the plaintiffs' statement and conduct in procuring the probate of the will and in obtaining the appointment of C., as administrator and trustee, were inconsistent with or in hostility to their present claims, how did this influence the action of the defendants or either of them to their injury, in case the plaintiffs shall be permitted to gainsay their former action? Indeed, have the plaintiffs' children (the defendants) taken any action on the faith of the plaintiffs' statements and conduct? Did they part, or have they parted with any property or right, or incurred any liability because of them? It is said that they acquired rights because of the plaintiffs' action not before possessed by them, which it is proposed to take away. *The question is, were the defendants influenced in obtaining those rights by* the plaintiffs' action and conduct? Were their rights acquired under such influence? Judge Allen says, in *Finnegan v. Carraher* (47 N.Y.,

> 500), 'They (the declarations) must be intended or calculated to influence the conduct of the party to whom they are made, and they must have, in truth, influenced his conduct in a manner by which he will be prejudiced if the party making them is allowed to retract.'"

We believe that this case furnishes a striking parallel to the one before the court. Did Wakelee part, or has he parted, with or lost any property or right, or incurred any liability because of the acts of Davis?

Admitting, for the sake of argument, that the act of Davis in moving upon a void judgment is inconsistent with his present claims, how did this influence the action of Wakelee to his injury, even if Davis shall now be permitted to deny the validity of the judgment? We reiterate: *The Record shows not the slightest evidence which, with the most distorted manipulation, reveals wherein there has come to Wakelee the loss of a dollar or of any right as the result of the order of October 31, 1876.*

We confidently submit that the plaintiff's case fails *in every aspect* to sustain *any one* of the requisites of the estoppel *in pais*.

Further; any detriment suffered by Wakelee is not due to the reliance upon any representation by Davis. Even if it be held that the order of October 31, 1876, be not good law, and that Wakelee has suffered detriment, it is in reliance *upon an erroneous decision of the Court;* but, assuredly, the fact that the consequence of the erroneous decision has been detrimental to one party and beneficial to another is no reason for applying the doctrine of estoppel *in pais*.

We believe that we have thoroughly demonstrated that there is no evidence before the court which can be held to create either an estoppel by record or an equitable estoppel.

Further Reasons Why There Could Not Possibly Be Any Estoppel *in Pais*.

We have shown in the preceding parts of this brief that the order was not *res adjudicata*. Now, these representations, if any, were made on the argument which resulted in the order. If it be true that the order is not binding on the question of the judgment, how can the mere oral arguments of counsel, or representations made prior to the rendition of the order, have the effect of an estoppel? If such a thing could be true, all arguments made by counsel when a bill is dismissed for want of jurisdiction might be considered as estopping a party, although the very judgment itself could not be binding.

Again, the oral argument of counsel was not evidence to show what representations were made.

We have already discussed the invalidity of this evidence in a previous part of the brief. In addition, we would say that it is not law that Davis should be held to be bound by oral statements of counsel made in the heat and ardor of an argument on questions of law. We refer to previous cases on this point.

Leaving out the arguments of these counsel, there is nothing in the record to show what occurred on the argument and there is no proof of any representation of fact in the case.

Point VII.

The decision of the court below was erroneous.

At final hearing Judge Coxe stated that the facts were the same as they were when the second de-

murrer was argued before Judge Shipman and that he felt bound to follow that decision, *but expressed no independent opinion.* We, therefore, have to look to the decision of Judge Shipman to see upon what ground the case was decided.

Analysis of the Argument found in Judge Shipman's Opinion.

1. The California judgment is void, citing

> Cooper *v.* Reynolds, 10 Wall., 308;
> Pennoyer *v.* Neff, 95 U. S., 714.

We agree with the Court in this respect.

2. Davis asserted the validity of the judgment.

We claim that there is no proof of this, and that, as a matter of fact, Davis did nothing of the kind; that there cannot be spelled out of the case anywhere any affirmation or acceptance of the judgment on the part of Davis.

3. Davis thereby became estopped afterwards to impeach the judgment, citing

> Henderson *v.* Staniford, 105 Mass., 504;
> Hughes *v.* Dundee, 28 Fed. Rep., 40;
> Railroad Company *v.* McCarthy, 96 U. S., 267.

We claim that no estoppel has been, or can be, shown, and that the cases cited are not in point. We will examine these cases shortly.

4. That Davis secured benefits by asserting that the judgment was valid, and, although it was invalid, his conduct has given the judgment validity, and it cannot now be considered void as against him, citing

> Mills *v.* Hoffman, 92 N. Y., 181.

We deny that Davis secured any benefits whatsoever; we deny that he asserted the judgment was valid; we deny that his conduct has given the judgment validity or that estoppel can validitate what is void; and we deny that the case cited is in point, as we will shortly show.

5. In order to justify a resort to a court of equity it is necessary to show some ground for equity other than the estoppel itself, whereby the party entitled to the benefit of the estoppel is prevented from making it available in a court of law, citing

> Dickerson *v.* Colgrove, 100 U. S., 578;
> Drexel *v.* Berney, 122 U. S., 241.

We agree that this is the law. Something is needed besides the mere fact of estoppel.

6. It is necessary to allege in a complaint in an action at law in the State of New York upon a judgment either,

(*a*). The facts showing jurisdiction of the court; or,

(*b*). That the judgment was duly recovered; and, if this cannot be done, the complaint would be dismissed on demurrer.

We maintain that this is not law. It is not necessary to set forth the facts showing jurisdiction of the court. This only was necessary at common law in pleading on judgments of inferior courts

It is not necessary to allege that the judgment was duly recovered, because the provisions of the Code do not apply to judgments of courts of record.

7. It is uncertain whether plaintiff could so frame his complaint under the foregoing provisions as to be able to obtain a standing in a court of law.

We claim that this is not law. We claim, however, that whether the plaintiff could frame his complaint under the foregoing provisions is immaterial. He can frame his complaint by proper allegations, showing that the court was a court of general jurisdiction and alleging simply the recovery of the judgment. We say further, that even if the code applied, the plaintiff in the law action could allege as legally true either the facts showing jurisdiction of the court or that the judgment was duly recovered, and that this would not be demurrable; and, if it would be perjury so to do, she need not verify her complaint.

8. It is improbable that plaintiff could, at the outset of his case, avail himself of the estoppels to gain a foothold in the court.

We claim that this is not law, and, even if it be the law, the plaintiff could frame a complaint in various ways, as we have shown, without setting up the estoppels, and if her complaint was answered, could introduce the facts concerning the estoppels in evidence in proof of the cause of action.

9. Hence, there is no adequate remedy at law; citing Drexel *v.* Berney, 122 U. S., 241, and, therefore, Davis must be enjoined from pleading the invalidity of the judgment.

With regard to this, we say that the Court's conclusion, depending upon the previous argument of the Court, is erroneous for all of the reasons which have been given with respect to each subdivision of the Court's argument.

It is only when the remedy at law is *doubtful*, or is *not adequate*, that the case of Drexel *v.* Berney applies, but, in the present case, the remedy at law was clear and adequate.

10. The Court then goes on to say that it will not decide whether the discharge in bankruptcy dis-

charges the judgment, because if the discharge be pleaded as a defense, the complainant can introduce the facts concerning the estoppels in evidence and thus have an adequate remedy at law.

With respect to this, we say that whether the Court decided that an injunction should issue to restrain Davis from pleading his discharge, *is one thing*, but it is *another very important question* whether the *discharge itself*, upon all of the conceded facts concerning the estoppels, was not absolutely unaffected and in full force.

If it be true, as we think we have shown, that notwithstanding every fact alleged and proved by the plaintiff concerning the alleged estoppels, the discharge is still valid and unimpaired, then the court below should have so found and said that inasmuch as the judgment, whether valid or invalid, whether affirmed, asserted or adopted by Davis or not *had become discharged* by Davis's subsequent discharge in bankruptcy, therefore, there was no cause of action at law whatsoever and should have held that a court of equity would not act ostensibly in aid of a proposed action at law when the very evidence in equity clearly showed that such action at law was an *impossibility*. A judgment discharged by a bankruptcy discharge is no longer alive. It is gone, wiped out.

We submit that we have answered all of the Court's arguments fully, and for a fuller answer we refer to the preceding portions of the brief.

The plaintiff, in her bill, has not claimed as the basis of the estoppel, that she was prevented by the order of October 31, 1876, from making an opposition to the discharge, nor has she claimed that by virtue of the advantage secured by said order Davis should be estopped. *The only ground of estoppel was that Wakelee was prevented from appealing, and so was injured.*

We, therefore, contend that the learned Judge, in making his decision, went outside of the bill, and

was not entitled, even though right upon the facts assumed, to hold the defendant estopped.

So far as the decision below went, it disregards everything but the specifications of opposition, the petition of Davis and the notice of motion to strike out the said specifications. If there had been no argument upon the motion, either oral or written, and Judge Hoffman had decided the motion as he had, Judge Shipman's decision would have been the same. His position, as we understand it, is this: That plaintiff filed specifications of opposition to the discharge of Davis. Davis then set up the judgment of November 18, 1873, as a bar to these specifications, and whether the judgment was valid or invalid, or whether Davis asserted it to be valid or not, is entirely immaterial. The fact is, that Davis got the same benefit as if the judgment had been valid, and got the benefit on the assumption that it was valid, and he cannot now, after getting the benefit of the judgment as a valid judgment, turn around and assert the same to be invalid because it suits his interests so to do. With due deference to the learned Judge, we do not think that his conclusions follow from the premises, or that the authorities he cites substantiates his position. He cites four cases, all of which we shall examine.

The first case is Henderson *v.* Staniford, 105 Mass., 504. This was a suit on a promissory note made by the defendant. The defendant answered and alleged that the plaintiff had brought suit on the note in California and that the judgment was still in force. It appears that the judgment was one by publication, without service or appearance, but was recovered and the publication took place in the county in California where the defendant had his legal domicile. The judgment was then valid in California. On these facts the Superior Court of Massachusetts gave judgment for the defendant and the plaintiff appealed. The Supreme Court of Massachusetts held that although there

was no service or appearance, yet the judgment was only *voidable* inasmuch as the defendant had been a citizen of California, the contract was made there, and that California continued to be his legal domicile and he was subject to the laws of the State. The Court held that even if the defendant, in some other proceeding, might reverse it on writ of error, or might avoid the judgment by a plea if suit were brought upon it, yet, nevertheless, the plaintiff cannot now treat the judgment as a nullity and sue on the note; that, as the judgment was voidable, the burden would be on the defendant by a plea to show its validity; citing Bissell *v.* Wheelock, 11 Cush., 277; Carleton *v* Bickford, 13 Gray, 591; Starbuck *v.* Murray, 5 Wend., 148.

The Court held that a plaintiff who gets a judgment under these circumstances cannot sue on the original claim.

In the course of the argument of the Court the following expression was used:

> "But, in the present case, the judgment in California being against the defendant alone, if he sets it up in bar of this suit, he affirms the validlty of that judgment against himself and is *eo instanti* estopped to impeach it afterwards."

This, of course, was a mere dictum. It was unnecessary for the Court to have decided this question, but it is clear that this dictum was simply based upon the theory that such an estoppel would occur when a judgment is *voidable* and not void, for the Court, in its opinion, says, that if the judgment had been absolutely *void*, then the plaintiff might have replied the want of jurisdiction and in that case he might have sued on the note in spite of the judgment, and, as a corollary of this last statement, it would be true that a defendant, setting up such a void judgment, would necessarily NOT be *eo instanti* estopped to impeach it afterwards.

The question before the court was not whether the *defendant*, by setting up the judgment as a bar, was estopped to impeach it. It was whether the *plaintiff* could claim said judgment to be invalid and therefore no bar to the action, and this question turned, not on the fact that the defendant had set up the judgment as a bar and so affirmed it, but upon the fact that the judgment was originally valid because obtained against defendant when domiciled in California. If the judgment had been *void* originally, the fact that the defendant set it up in bar would not have prevented the plaintiff from insisting upon its invalidity, and, likewise, would not have estopped the defendant in any subsequent litigation from claiming it to be invalid.

In other words, if the judgment had been void and not voidable, the plaintiff would have won. This shows the little weight that should be attached to the case as authority for Judge Shipman's decision, and even if we give all possible weight to the dictum cited, all that was before the court was a voidable or erroneous judgment and not a void judgment, and the court, by its dictum, only affirmed that the defendant, by setting up a voidable judgment as a bar to an action, thereby is estopped to impeach it afterwards.

The second case cited by Judge Shipman is *Hughes* v. *Investment Co.*, 28 Fed Rep., 40.

This was an action to recover attorneys fees. The defendant pleaded a judgment in a former action between the same parties for the same cause of action. The plaintiff replied that, within ten days from the entry of said judgment, and before this sult was begun, the defendant removed said cause, by a writ of error, to the United States Supreme Court, alleging that *the judgment therein was erroneous and contrary to law and ought to be reversed.* The Court (Judge Deady) held that defendant, by havng removed the former judgment to the Supreme Court on the allegation that it was

erroneous and ought to be reversed, was thereby estopped from now pleading it as a defense to the action, and asserting its validity and binding force as such defense.

In the first place, we do not believe this to be the law. In the second place, the judgment was a *valid* judgment, and not an *invalid and void* judgment, as is the judgment in the case at bar. In the third place, we do not see that, because a person cannot assert the invalidity of a judgment upon a writ of error, and afterwards insist upon its validity by way of bar to an action, that he, therefore, cannot reverse the position, and, after insisting upon the judgment as a bar, appeal from it as erroneous. In other words, if the defendant in the case cited had first set up the judgment in bar, would he have been precluded from afterwards taking a writ of error to the Supreme Court, and reversing it.

We think he would not; and the point was so decided by the General Term of the Supreme Court of the State of New York, 5th Department, January, 1889, in the case of *Ostrander* agst. *Campbell*, 20 St. Rep., 806. It was there held that the setting up of a judgment as a bar to an action did not estop the defendant from afterwards appealing from the same judgment, for the purpose of reversing it as erroneous.

Suppose, for instance, that in the case at bar the complainant had taken the position that the judgment of November 18, 1873, was void, and, therefore, constituted no bar to the specifications, and that Judge Hoffman had so held, and had denied the motion of Davis. If, afterwards, she had sued Davis upon that judgment in New York as a valid judgment, the case would be analogous to the one cited by Judge Shipman; but the reverse does not follow. To set up a void judgment as a bar, no more estops the defendant from afterwards claiming it to be invalid than the payment of a judgment estops a party from appealing from the same.

See *Hayes* agst. *Nourse*, 107 N. Y., 577, where it was held that such payment did not prevent a subsequent appeal.

The third case cited by Judge Shipman, *Ry. Co.* v. *McCarthy*, 96 U. S., 267, has no appreciable bearing on the question. There the railway company having alleged as the reason why they could not forward certain cattle on Sunday, that they had no cars, it was held that they could not afterwards justify their refusal by showing that it would have been illegal to ship cattle on Sunday. This the common case of a waiver. A party who gives one reason for his conduct thereby waives all other reasons; but what bearing has such a principle upon the present case?

The only other case cited is *Mills* v. *Hoffman*, 92 N. Y., 181. There a judgment had been obtained which was void or voidable, it does not appear which; as to one of the parties to the action, because of an irregularity in the appointment of a guardian *ad litem*. Afterwards the party received money by virtue of the judgment, with full knowledge of all the circumstances; and it was held that she could not afterwards repudiate the judgment and call the executor to a new accounting. This undoubtedly was true, provided, however, that her only title and right to the money was the judgment.

This is simply a case of ratification, and not of estoppel; and it is analogous to the principle which prevents a man from accepting the benefit of a judgment, and yet afterwards appealing from it; but this is not true where the party accepting the benefit would have had a right to the money whether the judgment stood or was reversed. In such case the party is entitled to appeal.

We do not believe that the present case is analogous to the case of a receipt of money under a void judgment, where the party would not otherwise be entitled to the money. The employment of a judg-

ment as a bar to an action is not receiving a benefit under the judgment, in the sense that the receiving of money by virtue of a void judgment is the receiving of a benefit. The two cases are not analogous. A party who receives money under a void judgment is in the same position as a party who receives money under a void assignment for the benefit of creditors. If he knows the judgment or the assignment to be void when he accepts the money, then he is forever afterwards bound by his choice; and he ratifies the judgment or assignment and makes it valid. If he does not know of the voidness at the time he accepts the money, then he is entitled, if he uses diligence, to return the money, and still claim that the judgment or assignment is void. But the principle applicable to these cases has absolutely no application to a case where a party sets up a void judgment as a bar, and by virtue of the acquiescence of his opponent, obtains a benefit.

This last is like the case quoted from 20 St. R., 806, *supra*, where, after a party had pleaded a judgment in bar successfully, was afterwards held entitled to appeal from the same.

We have examined all the cases cited by Judge Shipman, and we think we have shown their inapplicability to the case at bar.

The judgment of November 18, 1873, was a void judgment. It was not set up as a bar to the specifications of opposition. Though treated by the courts of California as a perfectly enforceable and valid judgment, the question whether the judgment was or was not valid did not depend upon any fact known to Davis, and not known to H. P. Wakelee. Its validity was simply a question of law. *Each side knew all the facts. Each side had equal opportunities of knowing the law.* In alleging that the judgment was in full force in his petition, Davis did not allege a fact. He was alleging simply a conclusion of law. Undoubtedly, this

would have been so had the question arisen in a State court of California. What the law of a given jurisdiction is, is within that jurisdiction a question of law, and not of fact, whether the question be raised in a State court or in a United States court. Therefore, in asserting the judgment, to be "in full force," all that Davis did was to make an assertion of a *legal conclusion*. This legal conclusion was acquiesced in by Wakelee; and, by virtue of such acquiescence, the order was made. There was nothing in his conduct which in any way misled Wakelee; and, if Wakelee was willing to acquiesce in a false conclusion of law or in an erroneous decision based in part upon such false conclusion of law, Davis ought not to suffer.

Point VIII.

The plaintiff has mistaken her remedy.

H. P. Wakelee had two remedies at the time. If he was dissatisfied with Judge Hoffman's order, he could have appealed from the order to the Circuit Court if he had taken the appeal at the proper time, and thus have corrected any error in the ruling.

He had another remedy. He could have moved in the bankruptcy court to set aside Judge Hoffman's order, on the ground that it was made under a mistake of fact, or of law, and he undoubtedly could have done this long after the expiration of the time provided for an appeal.

On such an appeal or on such a motion, either the appellate court or the court below in bankruptcy could have granted Wakelee any relief to which he showed he might be entitled.

The mistake, if any was made to the prejudice of Wakelee, was made in and by the bankruptcy court in California, and any relief or remedy should have been sought in that court, or on appeal from its decision.

Now, Wakelee deliberately preferred not to appeal, and also had no desire to make such a motion. He was perfectly satisfied with the decision; he preferred to collect his claim, if possible, outside of the bankruptcy court; he was even at that time endeavoring to do this in other jurisdictions; he deliberately elected to take the stand he did. Nothing that Davis did or said in any way influenced him. As the decisions then stood Wakelee knew that he must either give up any rights he had acquired outside of the bankruptcy court if he intended to stay in that court; or, if he intended to retain the rights he secured outside, that then he must not interfere in the bankruptcy proceedings. These were the alternatives which must have presented themselves to his mind at that time, and he chose to retain whatever advantages he might have secured outside of the bankruptcy court.

How inequitable, then, is it for the complainant, by this action, to attempt, through the aid of a court of equity, to take an inconsistent and different stand from the deliberately chosen position which Wakelee adopted years ago in the bankruptcy court

Wakelee had his day in court; he had his remedy then; he could have appealed or moved to set aside the order if it was erroneous. He deliberately chose to do neither of these things, because he *preferred* to let the order stand, not because Davis influenced him. This being the case, the complainant, who stands in privity with him, cannot now be heard to say that she, representing her predecessor in title, suffered any damage or detriment, or was influenced by any act or representation of Davis.

Point IX.

The appellee invokes various principles of law which have no application to this suit.

In the briefs which the complainant has previously submitted during the course of this litigation, she has cited a large number of cases which she claims are in point, and which, she also claims, substantiate her position.

Those numerous cases may be all classified under four different heads.

1. Some of these cases are cases which hold that a person who receives a benefit or acquires or takes property under or pursuant to a void, voidable, or valid judgment, contract, assignment, order, etc., is prohibited from thereafter impeaching or claiming the invalidity of such judgment, etc.

We, of course, agree that such is the law, but this principle of law had no application whatsoever to the present suit.

These are cases simply of ratification and not of estoppel. They are analogous to the principle which prevents a man from accepting the benefit of a judgment, and yet appealing from it.

Davis in no way was entitled to any benefit under the judgment in the California court. It did not decree him money or property. If such had been the case, and he had accepted the property or the money, this would be an affirmation of the judgment, provided that he knew of its invalidity.

But quite the contrary was the case. Davis is entitled to nothing under the judgment. It was against him.

2. Some of these cases are cases holding that where a representation is both of fact and of

> law, such a representation sometimes will create an estoppel. We do not differ on the law as to this. The only question is whether any given representation is strictly one of law, or whether it is strictly one of fact.

Now, so far as Davis alleged that the judgment was of record, that, of course, was a fact. So far, however, as he stated that the judgment was in full force, this was purely a representation of law. There was no representation of fact in it. That a representation to the effect that a judgment is void is a mere conclusion of law.

> See the case of Kinnier *v.* Kinnier, 45 N. Y., 531.

So conversely the representation that the judgment is valid is purely a conclusion of law.

> 3. Some of the cases cited hold that a man, by pleading a judgment in bar, cannot thereafter disaffirm the judgment where the matter arises between the same parties with respect to the same subject matter.

These cases, however, simply hold this with respect to avoidable judgment. If the judgment is absolutely void there can be no estoppel.

> See Henderson *v.* Staniford, 105 Mass., 504.

Again, Davis did not plead the California judgment in bar of anything. He moved to dismiss on the ground that Wakelee had elected to secure his remedy outside of the bankruptcy court, and that he should be bound by his election. There was no question of pleading the judgment, or affirming the judgment. The judgment simply happened to be a link in the history of the proceedings.

Again, the matter now arises in an entirely dif-

ferent way, although the parties or their privies are the same, and in such cases the former proceeding has no effect.

4. Some of the cases cited are cases which hold that a man cannot take inconsistent positions in court. That is, where he has two inconsistent remedies, and chooses one, he is prohibited from enforcing the other. We have no disagreement with counsel as to the law on this point, and applying it, it shows that this doctrine has nothing to do with this suit.

Assume that Davis had two inconsistent remedies in California. It is clear then that they were,

1. To have a trial upon the specifications of opposition, thus conceding Wakelee was properly in court; or

2. To move to dismiss Wakelee on the ground that he was improperly in court.

Now, applying the doctrine, Davis chose one remedy, namely, to dismiss Wakelee. What then results? By having chosen this remedy, he was precluded from thereafter choosing the other inconsistent remedy, namely, meeting the specifications of opposition on their merits, and having a trial with respect to the facts alleged in the specifications.

This is as far as the doctrine of election of remedies could go. These were the two inconsistent remedies. Davis chose one, and therefore could not enforce the other. We agree to this.

But this is very far from what the complainant contends, namely, that by choosing to move to dismiss Davis is prevented from denying the validity of the judgment. With this point the doctrine of election of remedies has nothing to do whatsoever. To claim the invalidity of the judgment was *not* the other inconsistent remedy which Davis would be precluded from if he moved to dismiss.

So far, then, as the complainant has attempted to go outside of the question of estoppel by record, and estoppel *in pais*, it appears by the foregoing analysis that all of complainant's cases are cases which, although enunciating well-known principles of law, have nothing whatsoever to do with any legal question involved in the present suit. Owing to the large number of these cases previously cited, we have not thought it necessary to mention them in detail. If, however, they are tested by the foregoing analysis, they will all fall readily into one of the four classes above mentioned.

They were undoubtedly cited by the complainant because she realized that if she were to succeed at all it could not be under any doctrine of estoppel, and hence that it was necessary for her to try and find some basis of right or equity by invoking other legal or equitable principles.

How poorly she has succeeded the foregoing analysis will disclose.

Point X.

SUMMARY OF THE ARGUMENT.

Point I.

There is no equity in the suit.

Point II.

The face of the bill shows a want of equity.

(*A*). It is a suit to declare future rights with respect to an action at law which is not pending.

(*B*). There is no possible cause of action at law.

1. Because the judgment is void and a court of equity will not enjoin a court of law.

2. Because no suit on the notes was ever properly begun under the leave of the bankruptcy court.

3. Because the record shows a valid discharge in bankruptcy.

Point III.

There was an adequate remedy at law.

(*A*). The bill was based on inability to plead under the Code. The Code does not apply, and the bill does not show inability to plead in the proper manner.

(*B*). The complainant could have sued at law without aid from equity.

1. By pleading generally without alleging jurisdiction.

2. By pleading estoppels in the law action.

3. By pleading fictitiously.

   (*a*). Pleading all the jurisdictional facts at common law.

   (*b*). By pleading that the judgment was duly recovered.

4. If pleading fictitiously would be perjury, the complaint need not be verified.

Point IV.

The injunction was broader than the cause of action alleged and made out.

Point V.

The defendant was not estopped to deny the judgment. There was no estoppel of record.

1. The order was not an adjudication.

(*a*). Because the order was interlocutory.

(*b*). Because the validity of the judgment was not passed on.

(*c*). Because the estoppel was not mutual.

2. If the order was *res adjudicata*, it is not an adjudication as to the judgment, because—

(*a*). The second suit between the same parties is for a different cause of action.

(*b*). The question as to the judgment was not in dispute.

(*c*). It was not necessary to have adjudicated with respect to the judgment.

(*d*). The oral argument was not evidence as to the ground of the decision.

(*e*). Such an adjudication is not binding on the New York courts.

Point VI.

Davis is not estopped to deny the judgment. There is no estoppel *in pais*, because

1. Davis did not assert the validity of the judgment.

2. The representations were of law.

3. They were true.

4. They were known to both parties.

5. They were not intended to mislead.

6. There was no right to rely upon them.

7. They were *ex parte* statements.

8. They were not relied upon.

9. Davis obtained no benefit.

10. Wakelee suffered no detriment.

11. The order not being *res adjudicata*, the representations cannot create any estoppel.

12. The oral argument was not evidence.

Point VII.

The Court's decision was erroneous in all its elements.

Point VIII.

The complainant has invoked principles of law which have no application to this suit.

Point IX.

The plaintiff has mistaken his remedy.

Point XI.

The judgment of the Court below should be reversed, with costs.

LOGAN, CLARK & DEMOND,
Attys. for Appellant.

WALTER S. LOGAN,
CHARLES W. DEMOND,
Of Counsel.

Office Supreme Court, U. S.
FILED.
JAN 18 1895
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 181.

ERWIN DAVIS,

Appellant,

versus

ANGELICA WAKELEE,

Appellee.

APPELLEE'S BRIEF ON APPEAL.

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NEW YORK:
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(EVENING POST BUILDING.)

1895.

Supreme Court of the United States.

ERWIN DAVIS, Appellant,		
vs.		No 181.
ANGELICA WAKELEE, Appellee.		

BRIEF OF APPELLEE ON APPEAL.

Statement of Facts.

A judgment *in personam* void for lack of jurisdiction of the person was entered in a California State Court against said Erwin Davis, a bankrupt, before his discharge upon a claim already proved against him in bankruptcy. When the bankrupt applied for his discharge the creditor opposed it. The bankrupt petitioned to cancel the proofs of debt and dismiss the opposition; in his sworn petition and agreed statement of facts adopting the judgment as valid, and in his oral argument asserting its validity, and the doctrine that the original claim as proved had ceased to exist and had been so completely merged in the judgment as to become a new debt created since the petition in bankruptcy was filed, and that, therefore, this new debt was unaffected by those bankruptcy proceedings; could not share in the as-

sets; would be unaffected by the discharge if obtained; and that the creditor had, therefore, no standing in court unless he waived the judgment.

The Court adopted these views and granted an order as requested canceling the proofs of debt and dismissing the opposition. The creditor never waived the judgment nor appealed. The bankrupt debtor obtained his discharge, turned immediately about and sought to upset the judgment as void, and has since uniformly resisted all attempts to recover on the judgment on the ground that it is void for lack of jurisdiction of the person.

For his purpose he deliberately adopted as valid a judgment void for lack of jurisdiction. He made no mistake of law through ignorance, for he had already defended in an action on the judgment then pending by an averment that it was so void.

An action on the judgment must be brought in New York, where the bankrupt resides. The creditor's assignee, the complainant, cannot obtain relief at common law because she must in her complaint aver the jurisdictional facts which never existed.

The New York Code of Civil Procedure, § 532, allows, instead of such averment, an allegation that the judgment sued on was duly made or given, which in this case is not true, and it is doubted (in decisions of N. Y. State Courts) whether the Code provision applies to pleading on foreign judgments such as this is; and this question is still doubtful, having never been decided by the New York Court of Appeals.

The complainant has no right in a complaint at common law upon such judgment to set up the estoppels making the judgment valid. A motion to strike them, as evidence, out of the complaint would be granted. Unless these estoppels are pleaded a demurrer would put a stop to this case before evidence thereof could be put in. This would leave the creditor remediless at law. The complainant has therefore come into equity for relief in aid of a proposed action at law upon the judgment, asking *inter*

alia an injunction to restrain the defendant (the ex-bankrupt debtor) from setting up in any way that said judgment is not valid or was not duly made or given, and such relief has been granted by the decree. The defendant appeals, contending that he is not estopped from contending that the judgment is void either by his petition, or by his agreed statement of facts, or by the arguments of his counsel, or by the order in bankruptcy adopting the judgment as valid, &c., or by his election of remedies, and that complainant has her remedy at law, in which she can in her complaint either plead the estoppels or that the judgment was *duly given* or made.

A Fuller Statement of Facts

It appears that Erwin Davis, the appellant, had, early during the year 1869, been contemplating becoming a voluntary bankrupt and had employed counsel with this in view six months before he actually filed his petition in bankruptcy (see evidence of this counsel, Rec., p. 84, Q. 9).

Nevertheless, he gave for value to Henry P. Wakelee promissory notes for $15,720 a few days before he filed his petition, when he must have known he could not pay them and must have intended to take *the value* in exchange for his idle promise, from which a discharge in bankruptcy would release him. This was fraud, inadvertently revealed by his counsel twenty years after date (Rec., pp. 21, H.; 46, I.).

The appellant, Erwin Davis, filed his petition in voluntary bankruptcy in the District Court of the United States for the District of California on the 11th day of September, 1869, and was adjudged a bankrupt September 30, 1869, and thereupon Henry P. Wakelee duly proved up in said proceedings certain debts or claims against Davis due from Davis to Wakelee, upon said promissory notes; said District Court of the United States, by an order en-

tered July 8, 1873, granted leave to said Wakelee to commence an action against Davis for the recovery of said claims (Rec., pp. 22, 46, 29, 34, 37, 68).

Wakelee, as plaintiff, July, 1873, commenced such action upon said promissory notes against Davis as defendant in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, by publication only of the summons (Rec., pp. 37, 68, 74).

On the eighteenth day of November, 1873, in said action, without any personal service of summons upon or any appearance by Davis or any proceedings by attachment or *in rem* therein, a judgment was given or made by and in said District Court of the Fifteenth Judicial District in favor of Wakelee and against Davis, by the terms of which judgment it was ordered, adjudged and decreed that Wakelee have and recover from Davis, in United States gold coin, the sum of twenty-two thousand seven hundred and sixty $\frac{26}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from November 18, 1873, till paid, together with said plaintiff's costs and disbursements incurred therein, amounting to the sum of forty-nine dollars, amounting in all to twenty-two thousand eight hundred and nine $\frac{26}{100}$ dollars (Rec., p. 77).

December 23, 1875, Davis filed in said District Court of the United States a petition for his discharge in said bankruptcy proceedings (Rec., pp. 23, 47).

Thereupon, February 23, 1876, Wakelee filed in the same matter specifications of opposition to the discharge in bankruptcy of Davis, alleging therein the following acts of Davis: Concealment of books relating to his estate or effects; being a merchant and trader and not keeping proper books of account; procuring assent of certain creditors to his discharge by pecuniary considerations; influencing actions of such creditors as to discharge by such considerations; fraudulently absconding from and remaining ever since out of jurisdiction of the United States of

America during his examination in bankruptcy so that he could not be fully examined after having been duly summoned to appear (Rec., pp. 34 (Ex. C), 68).

THE PETITION.

On March 18, 1876, Davis filed in the said matter a sworn petition and notice of motion to cancel said proofs of debt and dismiss and disregard said specifications of opposition, and this petition alleged the said proof of debt and leave of Court to sue, and that said Henry P. Wakelee *commenced an action* July 19, 1873, against Davis in said State Court for the same cause of action on which he had proved up said debt as aforesaid, and that "*in* DUE COURSE *of said action*" *he* "*obtained a judgment*" *in his favor and against Davis*, "*which said judgment still stands of record in said Fifteenth District Court, and is in full force.*" Said judgment set up in said petition was that given November 18, 1873, as aforesaid (Rec., p. 36; Ex. E and D, p. 68).

THE MOTION.

July 20, 1876, said motion was heard by said District Court of the United States upon said petition, notice of motion, specifications of opposition and agreed statements of facts, and was argued both by counsel for said Wakelee and Davis (Rec., pp. 53–66, 83, Dep. Barnes, Naphtaly, Thompson).

THE STIPULATION OF FACTS.

This was signed by counsel for both parties whereby "*the following facts*" were "*stipulated to be correct and true*"; the filing of the petition in bankruptcy, September 11, 1869; the adjudication of bankruptcy, September 30, 1869; the proof of debt, November, 1869; the petition for leave to sue, June 28, 1873; the order of leave to sue; that Wakelee thereafter "*commenced*" an "*action*" *in the State Court;* "*obtained (a) judgment*" for the amount

sued for; sued and attached property on such judgment in France and the removal thence to England of the suit which was then still pending; that the judgment was procured in California, and action in France commenced prior to petition for discharge; that Wakelee filed opposition to the discharge without cancellation of the judgment or dismissal of action in France (Rec., pp. 67, 68; Exh. "Stipulation of Facts").

On the argument Davis' counsel (Barnes, Q. 29, 31, Rec., p. 56; Naphtaly, Q. 26, 27, pp. 63-4; Thompson, Q. 17-24, pp. 84-6) took the position that the judgment was valid and constituted a new debt created (November 18, 1873) since Davis' petition to be declared a bankrupt was filed (September 11, 1869), and therefore could not be barred by any discharge in bankruptcy thereafter granted to Davis in these proceedings. All of which is more fully hereafter set forth.

The Order or Decree.

As the result of this motion, Judge Ogden Hoffman, who presided, granted a decree entered in those proceedings, October 31, 1876, which simply canceled Wakelee's proofs of debt, and dismissed, set aside and disregarded Wakelee's specifications of opposition to the final discharge of Davis in bankruptcy (Rec., pp. 25, 37 [Exh. F.], p. 68).

No appeal from this decree was taken during the ten days allowed by law, nor at any time (U. S. R. S., Sec. 4981; Barnes', Q. 35, p. 57; Naphtaly, Q. 32, p. 64; Thompson, Q. 24, p. 86).

Wakelee was dismissed from the proceedings. Davis was not obliged to meet the specifications of opposition on their merits, and his discharge in bankruptcy was granted March 6, 1877 (Rec., pp. 25, 47, 88.)

Three documents used on the motion are the only ones necessary to be examined to show the facts submitted to Judge Hoffman and his legal conclusions.

These were Davis' petitions to dismiss (Rec., p. 36), the stipulation of facts (p. 67), and the decree or order (p. 37), all before recited. There was no written opinion. Judge Hoffman could not recollect the grounds of his decision (Rec., p. 67).

There is no brief of counsel on either side filed or to be found anywhere after search (Rec., p. 62; Naphtaly, Q. 25).

The Judge's Notes.

Judge Hoffman's notes of argument is the only writing made at the time, showing what counsel contended for as a matter of law, and this is only a memorandum of the titles of a few cases cited by Judge Hoge, counsel for Davis (Rec., p. 83, Exh. "Notes").

The leading citation noted by Judge Hoffman I speak of hereafter.

I submit the following digest of the other cases noted on Judge's "Notes" (*Rec., p.* 83).

1 *Am. Law Times n.* 107-113 *S. C.* 2 *N. B. R.* 79. *Qto In re Williams, U. S. District Court, Dist. of Conn., Oct.*, 1868:

Shipman, J., held "a debt upon which a judgment of law is founded is merged in that judgment and extinguished by it. The judgment constitutes a new debt, which takes its date from the time of the recovery." The debt, upon which the judgment against the bankrupt was recovered, existed at the time he was adjudicated a bankrupt, judgment recovered after adjudication and before discharge. The debt was extinguished by the judgment; it has had no existence since the rendition of that judgment, and can never again be called into life. The judgment itself constitutes a debt, but it had no existence at the time of the adjudication in bankruptcy, and is not therefore provable against the bankrupt's estate.

6 *N. B. R.* 338, *in re Mansfield U. S. District Court, Dist. of La:*

A gave his bond to the United States as security for a certain claim against a vessel. The case was tried and a decision adverse to the U. S. rendered. Additional evidence was produced in the Circuit Court on appeal, and the decision of the District Court was reversed, &c., decree of condemnation rendered on the 27th of May, 1869.

While proceedings were pending in the Circuit Court A filed his petition in bankruptcy, and was, on the 30th day of June, 1869, discharged from all his debts dischargeable under the bankrupt act. On the 8th June, 1870, the Circuit Court overruled A's plea of discharge in bar of the claim, and gave judgment against him on the release bond.

On the 21st April, 1871, the Secretary of the Treasury, for a valuable consideration, transferred the judgment to B, who, on the 27th May, 1871, filed a petition to set aside A's discharge. Held:

That when the U. S. elected to take judgment upon the bond they parted with all right to prove it as a debt due and payable from the bankrupt at the time of the adjudication of bankruptcy and as a debt to be proven against the estate, that it is *res judicata*, that this debt is not affected by the discharge, as the judgment is subsisting and operative. Exception sustained and the petition dismissed.

102 *Mass.*, 472, *Bradford* vs. *Rice:*

Action on judgment. Defense discharged in bankruptcy. Adjudicated a bankrupt September 10, 1867. Judgment on provable debt October 3, 1867. Certificate of discharge January 14, 1868.

Gray, *J.*, held original provable debt merged in and extinguished by the judgment. Judgment was not provable in the bankruptcy proceedings nor discharged by the certificate.

(*Cites Shipman, J. U. S. Dist. Court of Conn., in re Williams*, 2 *Bank. Reg.*, 79.)

27 *Maine*, 441, *Holbrook* vs. *Foss:*

Action upon a judgment recovered May, 1843, upon a promissory note, payable May, 1842. Defendant filed his petition to be declared a bankrupt December 9, 1842. Declared a bankrupt February 21, 1843. Obtained a certificate of discharge December 1, 1846.

"The question presented for decision is, whether "the judgment thus recovered in May, 1843, can be "considered to be a debt, contract or other engage- "ment of the defendant existing on December 9, "1842, and provable against him in bankruptcy. "The contract was merged in and extinguished by "the judgment, which constitutes a new debt, hav- "ing its first existence at the time of its recovery. "The judgment not being a new debt due from the "defendant at the time when his petition was filed, "could not have been proved in bankruptcy against "him. It was not, therefore, discharged by the "certificate obtained in the year 1840."

Walcott vs. *Hodge*, 15 *Gray*, 547:

The defendant, an attorney at law, had become indebted to plaintiff by collecting money for him. Before bankruptcy proceedings had been begun plaintiff had recovered judgment against defendant. Held, that the debt was not contracted by one acting in a fiduciary character.

Held, that had it been so contracted it would have lost such a character when merged in a judgment.

In re Montgomery, 3 *B. R.*, 426, *Blatchford, J.:*

On 19th July, 1869, five months after Montgomery was adjudicated a bankrupt, a new note was again for the same amount made by Montgomery. This second note was protested and another note was made, signed by Griffin, Montgomery's name not appearing on the paper. Held, that the first note was merged in the one in suit. On this last note Cowles' claim was against Montgomery alone

and not against his estate (*citing in re Williams*, 2 *N. B. R.*, 229).

The documents simply set up the facts, adopt the judgment per force as valid and dismiss Wakelee from Court.

The conclusions of law nowhere appear except inferentially from the fact that Wakelee was dismissed.

THE ARGUMENTS OF COUNSEL.

In order to show distinctly what were the points of law presented by counsel to the Court for decision and decided by the Court, and whether Davis then took a position inconsistent with his position here and elected one remedy which estopped him from defending against this claim the testimony of Barnes and Naphtaly, counsel for Wakelee, and of Thompson, counsel for Davis, were introduced (Rec., pp. 53, 60, 83). There was no objection made to reading Thompson's deposition in evidence.

They agree as to what occurred on the motion.

The leading case noted on Judge Hoffman's Notes of Argument is stated at some length by the witness Thompson in his testimony, as follows (Rec., p. 84, Q. 17):

"The Wakelee and Cornwall oppositions I moved to set aside on the ground that they had obtained a judgment in the District Court of the State of California, after the petition in bankruptcy had been filed, and that that judgment stood of record, the ground appearing in the paper itself. I drew it myself and filed it. I based the motion on a case decided by Judge Lowell in Massachusetts, found rereported in the Fifth Bankrupt Registry, I think, on page 353, being entitled *In re* Gallison *et al.*, which was to the effect that a party having proved his debt in bankruptcy, and subsequently going into a State Court, and obtaining a judgment, could not file opposition, or was not entitled to file and be heard in opposition to the bankrupt's discharge, un-

less he filed a stipulation that he would abide by the decision of the United States Courts on the question of discharge, but if he filed that stipulation that he would discharge the judgments in case the bankrupt obtained his discharge in the United States Courts, that he would allow them to remain. As I viewed the case at the time, it was to compel them to choose between remaining in the United States Court and depending upon defeating Mr. Davis in his discharge, or to get out of the United States Court and take their chances in the State Court under that judgment. As they had filed with their opposition no stipulation to satisfy their judgments in the State Courts, in my view they had no standing in the Bankruptcy Court, and could not have, unless the Court permitted them afterwards to file such stipulation. No such stipulation was ever filed. On the hearing of my petition to dismiss their opposition and cancel their debt, Judge Hoge made the principal argument on the part of Mr. Davis. Mr. Dorsey read the stipulation as to facts, which stipulation has already been introduced in evidence herein, and I think made some short argument. General Barnes and Mr. Napthaly argued it on the other side. The facts covered by the stipulation were all conceded. There was no controversy as to facts; the question before the Court was simply a legal question grow-out of those facts. The question was an unsettled question even under the old Bankrupt Acts, before that of 1867. Some of the Courts had held that judgments obtained on old debts that exis ed at the time of the filing of the petition in bankruptcy, on which judgments had been obtained, were discharged by a discharge in bankruptcy; and others had held the reverse. And the same was true under the Act of 1867, at that time. *Judge Hoffman in those cases held that they were not discharged, and therefore dismissed the opposition.*"

The order recited no grounds of decision or points decided (Exhibit F, Cancellation, Rec., pp. 37, 68).

Wakelee never appealed from the order of Octo-

ber 31, 1876, and did not further oppose Davis' discharge (*supra*).

Davis' proceedings were done in fraud upon the Court. His intent, at the time of the motion, to obtain Wakelee's dismissal from Court on the ground that he had a valid judgment which could not be barred by Davis' discharge, and then to turn upon Wakelee and defeat his recovery on the ground that the judgment was void and barred by his discharge, is quite apparent from his subsequent conduct.

After he had procured his final discharge, March 7, 1877 (Rec., p. 47, par. XXII., p. 25, p. 88), Davis turned about and on April 12, 1877, moved in the California State Court to vacate and set aside the judgment therein entered (on the ground, among others, that it was null and void because the summons was served only by publication and under order issued on insufficient affidavit) and to be allowed to set up his discharge in bar (Rec., p. 78, Exh. "Transcript").

The Court granted the motion by order of July 10, 1877. The Judge's opinion was filed and shows that Davis' theory of law was adopted by the Court (Rec., p. 81, Exh. "Transcript").

This order was reversed on appeal to the Supreme Court of California February 5, 1891, on other grounds (Rec., p. 86, Exh. "Transcript" Remittitur).

In the action pending in England, H. P. Wakelee *vs.* Erwin Davis, brought upon said judgment in 1875, Davis had answered (Aug. 7, 1876) that the judgment was void for lack of jurisdiction, and April 19, 1877 (about a month after he got his discharge), he amended his defense by also pleading his discharge in bar, still maintaining that the judgment was void as aforesaid. Wakelee, however, replied to this defense, insisting on the validity of the judgment and that it was not barred by the discharge (Rec., pp. 88, 89).

The appeal in California Court operating as a stay and the expense being large, the English case was

discontinued on payment of £155 19s. costs by Wakelee (Rec., p. 89).

It is thus shown that Davis was, August 7, 1876, contending in England that the judgment of November, 18, 1873, was void, while in California, by his petition, 18th March, 1876, his counsel, on argument of motion July 20, 1876, see notes of argument (Rec., p. 83), and the stipulation filed August 15, 1876, was asserting that it was valid. He cannot now plead mistake or ignorance. His choice was deliberate. And this shows how absurd is the claim that Davis' position, holding the judgment of November 18, 1873, to be valid, was simply a mistake of law. It was no mistake at all. He took that position, meaning to abandon it as soon as he got his discharge. He did abandon it. He acted in fraud toward the Court and toward his creditor.

The same is true as to his position that the old debt merged in the new judgment, so as to make a new debt not provable in those proceedings, and not barred by any future discharge. He intended at the time to repudiate that doctrine, and he did repudiate it as soon as he got his discharge.

1882. Counsel having been requested by Wakelee to sue upon the California judgment, ignorant of what took place before the Bankruptcy Court, and of the estoppels thereby created, advised against it and in favor of a suit on the notes, on the ground that the judgment was void, and that the leave to sue granted by the Court in Bankruptcy took the claims out of the bankruptcy proceeding, so that a discharge would not affect the claims. This advice was given on the authority of a case similar to this against this same defendant, then just decided by the New York Supreme Court, General Term, in McDonald *v.* Davis, 26 Hun, 53. The action on the notes was accordingly brought in 1882, and was long pending, awaiting the decision of the Court of Appeals in the McDonald case. This was rendered 1887, reversing the General Term. Counsel having learned of the estoppels involved herein, discon-

tinued the New York State Court cases on paying $645 costs and allowance (Rec., pp. 52, 87), and commenced this suit.

The bill was filed April 13, 1888; defendant demurred; demurrer sustained by Judge Coxe by order of January 29, 1889; amended bill thereupon filed; defendant demurred; demurrer overruled by Judge Shipman by order of June 29, 1889; replication thereupon filed; final hearing had and final decree entered March 9, 1891, and this appeal allowed April 16, 1891; record returned and filed in this Court May 22, 1891.

POINTS OF LAW.

The Main Questions of Law Involved.

Treated broadly, the appeal depends upon establishing two propositions simply:

(*a*). That the facts in the case do not estop the defendant from denying that the judgment of November 18, 1873, is valid.

(*b*). That there is a plain, adequate and certain remedy at law, and therefore that a court of equity has no jurisdiction.

It devolves on the appellee to maintain the converse of these propositions.

A. The appellant is estopped to deny that the judgment of November 18, 1873, *is valid.*

1. *The void Judgment.*

The judgment itself was void upon its face. It was obtained without personal service of process upon Davis, the defendant, he being at the time absent from the State of California. The sole ground upon which to found the jurisdiction of the

Court was the publication of the summons had in the newspapers pursuant to Section 412 of the California Code of Civil Procedure as it then stood. The State courts at that time sustained such service as legal (Hahn *v.* Kelly, 34 Cal., 391).

The Massachusetts Supreme Court had decided that such a judgment was not void but voidable, 1870 (Henderson *v.* Standiford, 105 Mass., 504).

This Court had decided, 1870, Cooper *v.* Reynolds, 10 Wall, 308, that such a judgment was void, and the same Court, in Pennoyer *v.* Neff, 95 U. S., page 714, decided in 1877, said that decision was an "*authoritative exposition of law*" (p. 724), and that "to the same purport decisions are found in all the State courts" (p. 732), and "that a judgment which can be treated in any State of this Union as contrary to the first principles of justice and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered" (p. 732).

This decision disposes of the question. The judgment never was valid even in California.

The last decision was followed by the California Supreme Court in (1879) Belcher *v.* Chambers, 53 Cal., 635.

It is plain then that the California State Court had no jurisdiction of Davis' person or property in that case, and that the judgment was void. Davis thoroughly appreciated the whole point, and made it for his own purposes.

2. *Election of Remedies.—Davis' motion to cancel Wakelee's proof of debt and dismiss his opposition to his discharge.*

Davis' petition for a discharge was opposed by Wakelee, who charged him with such acts as under the law would prevent the discharge if proven (U. S. Rev. S., Sec. 5110).

In despair of successfully contesting Wakelee's opposition on the merits, Davis resorted to strategy

and moved to strike out Wakelee's proofs of debt and dismiss his opposition.

Upon this motion he claimed that the judgment of November 18, 1873, was valid.

He cannot plead a mistake of law. He thoroughly understood the whole question. His eyes were wide open to the worthlessness of that judgment.

He deliberately made the assertion in fraud of the Court and of Wakelee, as shown by a brief review of the facts.

March 18, 1876, Davis filed his notice of motion and petition wherein his counsel swore to the validity of the judgment. July 20th, the motion was argued; Aug. 15, 1876, the stipulation of facts was filed; Oct. 31, 1876, the order was entered dismissing Wakelee's opposition. And yet in that very month of August the counsel for Davis in England amended Davis' answer in Wakelee's suit against setting up that this very judgment was void for lack of jurisdiction. On March 7, 1877, Davis having disposed by the order of Oct. 31, of Wakelee's opposition, obtained his discharge; April 12, 1877, he began proceedings in the State court to vacate the judgment on the ground that it was void for lack of jurisdiction.

(*a*). *The motion Papers.*

The motion was made upon notice, petition, record in bankruptcy, stipulation of facts and argument, resulting in the order or decree of Oct. 31, 1876.

These papers do not specifically state the theory of the decision.

The necessary facts contained in the record in bankruptcy are briefly stated in the Stipulation of Facts (Rec., p. 67), as are also those set forth in the petition thus:

Sept. 11, 1869. Davis filed petition and schedule.
" 30, " Wakelee's debt proven up.
July 6, 1870. Proof amended.

June 28, 1873. Wakelee petitions for leave to sue.
July 8, " Order of leave granted.
July 19, " Wakelee commenced action in State court; obtained judgment therein.
Subsequently sued on said judgment (attaching property) in France.
Transferred last suit to England (still pending).
Dec. 23, 1875. Subsequently Davis petitions for discharge, and Wakelee opposes, without cancellation of his State court judgment or dismissal of action in France. Finally Davis motion to expunge proof of debt.

This stipulation is signed by counsel for both parties.

The petition sets forth more fully (1st) the petition and order of leave to sue, and (2d) states that Wakelee, 19th July, 1873, "commenced an action" in the (State) court against Davis for the same cause of action on which he had proved up his debt in bankruptcy, and in the due course of the said action Wakelee obtained a judgment of the (State) court in his favor and against Davis, "which said judgment still stands of record in said Fifteenth District and is in full force."

It was thus agreed that there was a judgment.

The petition is sworn to by Davis' counsel.

The order canceled Wakelee's proofs of debt, and dismissed, set aside and disregarded Wakelee's specifications of opposition.

The assertions in the petition and statement of facts are plain assertions of the validity of the judgment of November 18, 1873.

1st. The assertion that an action had been "commenced" in the State Court was an assertion that it was commenced according to California Code Civil Procedure: "Section 405. Civil actions in the courts of this State are commenced by filing a complaint and the issuing of summons thereon."

In an action to annul a judgment for lack of citation, it appeared that plaintiffs had defeated in another court a claim of defendant by alleging the pendency of the very action in which the judgment in question was afterwards recovered. *Held*, that this amounted to an assertion that plaintiffs had been cited, and were therefore estopped from annulling the judgment (Abbott *v.* Wilbur. 22 La. Ann., 368).

2d. The assertion that "in due course of said action a judgment" was obtained contains two distinct statements that the Court had jurisdiction.

An action void *ab initio* cannot proceed "in *due* course."

Kindred words have been passed upon by the courts.

The word "duly" means in a proper way or regularly or according to law.

Robertson *v.* Parkins, 129 U. S., 233.

"The expression 'duly adjudged, as üsed in the statement for the submission of this controversy, therefore, means adjudged according to law, that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity and procedure, and to confer jurisdiction both of the subject matter and of the parties affected by the judgment, including the defendant.

A judicial officer has jurisdiction, when he has power to inquire into the facts, to apply the law to pronounce the judgment. Any step in the cause or proceeding before him is necessarily the exercise of the jurisdiction, and that step cannot be 'duly' taken unless jurisdiction exists already. The final step in particulur, the making of the judgment, cannot be 'duly' taken unless all the preliminary steps on which it is based have likewise been 'duly' taken."

N. Y. Ct. of App. Brownell *v.* Town of Greenwich. 114 N. Y. p. 527.

Under these decisions there can be no doubt that the assertion that "a judgment was obtained in due course of an action" commenced in a stated court was an assertion of the jurisdiction of the court over the person of the defendant and the subject matter and of the absolute validity of the judgment recovered. It was an assertion that every step from start to finish necessary to the validity of the judgment was taken.

But the petition further states that the "judgment still stands of record in said Fifteenth District and in full force."

This assertion adds force to our reasoning. This Court has construed the closing words thus:

"A decree remaining in full force is not open to contest in a subsequent suit between the same parties."

Hornbuckle *v.* Stafford, 11 U. S., 389, 394.
Bryan *v.* Kennett, 113 U. S., 179. 198.
Henderson *v.* Staniford, 105 Mass., 504.

It is impossible for a void judgment to have any force whatever. This is plainly shown by the decision of this Court in Pennoyer *v.* Neff, as quoted above (p. 15).

3d. The ground of complaint set forth in the stipulation of facts to the effect that Wakelee opposed the discharge without cancellation of the State Court judgment was a further assertion of the validity of that judgment. A void judgment needed no cancellation. It hurt no one. Had no force.

THE ORAL EVIDENCE.

The appellant has during this litigation declared that it is uncertain what was decided by the order of October—whether Wakelee was excluded from the Court of Bankruptcy on the theory that the leave to sue took him out, which was the theory adopted by the N. Y. Supreme Court in McDonald *v.* Davis, 26

Hun, 53 (reversed by N. Y. Court of Appeals in 105 N. Y., 509), or whether it was because he was represented to have obtained a valid judgment.

We think ourselves that the theory of the law upon which the order is based does not appear with sufficient distinctness from the order or from the motion papers.

Graham *v.* R. R. Co., 3 Wall., 704.

We then resorted to parol and extrinsic evidence to show what exact points were presented to the Court for decision, a method often allowed under the decisions of this Court.

Cromwell *v.* County of Sac, 94 U. S., 351.
Davis *v.* Brown, 94 U. S., 423.
Campbell *v.* Rankin, 94 U. S., 261–3.
W. A. & G. S. P. Co. *v.* Sickles, 24 How., 333.
Walter A. Wood *v.* Skinner, 139 U. S., 293.
Miles *v.* Caldwell, 2 Wall., 235.
Also Bell *v.* Merrifield, 109 N. Y., 202.

Had an opinion been handed down by Judge Hoffman we could have put it in evidence.

Birckhead *v.* Brown, 5 Sandford, 134.
Kerr *v.* Hays, 35 N. Y., 331.
White *v.* Madison, 26 N. Y., 117.

Judge Hoffman's recollection of the grounds of decision would have aided us, but he had none.

Woodruff J. Rider *v.* Union India Rubber Co., 4 Bosw., 169, 177.

There were no briefs of counsel to be found or they would have been produced in evidence, as held proper in

Burthe *v.* Denis, 133 U. S., 514, 522.

So we resorted to the only evidence we could get, the Judge's brief memoranda of the cases cited by Davis' counsel and the oral evidence of the counsel

for Wakelee and for Davis. They agree. We read in evidence, without objection, the deposition of Thompson, attorney for bankrupt, taken by the appellant.

And in addition to the points appearing on the record we find the theory of the case upon which the decision must have rested fully declared.

The counsel for Davis contended against the arguments of Wakelee's counsel:

(*a.*) That the old debts proved in bankruptcy had become merged and extinguished in the judgment.

(*b.*) That the judgment constituted a new debt created since the original petition in bankruptcy was filed.

(*c.*) That such new debt was not provable in these bankruptcy proceedings because it did not exist at the time of filing said original petition.

(*d.*) That such new debt was not affected by the bankruptcy proceedings at all.

(*e.*) That the Court in bankruptcy had no jurisdiction over such new debt or judgment.

(*f.*) That the creditors had therefore no standing in court to oppose the discharge.

(*g.*) That the discharge granted could not affect this new debt evidenced by the judgment.

All these seven last points were duly before the Court for decision and were necessarily upheld by the nature of the order of October 31, 1876.

This testimony is further corroborated by the cases cited on the Judge's notes of argument.

Davis' pretense that the adoption of the judgment as valid was a mutual mistake, and that therefore the order of October 31st is not binding, is a very desperate defense. Even if it were true that he mistook the law, yet both parties agreed that it was a valid judgment and the Court so held "*communis error facit jus.*"

Thomas *v.* Poole, 19 So. Car., 323.

This decision makes the rule of action for this case and these parties. A fact or controversy once decided by competent tribunal is conclusive between same parties.

Bank of U. S. *v.* Beverly, 1 How., 134.
Aspden *v.* Nixon, 4 How., 467.
Parrish *v.* Ferris, 2 Black, 606.
Cromwell *v.* County of Sac, 94 U. S., 351.
Secombe *v.* R. R. Co., 23 Wall., 108.
Bryan *v.* Kennett, 113 U. S., 179.
Russell *v.* Place, 94 U. S., 606.
Gould *v.* Evansville & R. R. Co., 91 U. S., 526, 533.

Judgment of Court of competent jurisdiction while unreversed concludes the subject matter between the same parties (U. S. *v.* Nourse, 9 Pet., 8), and cannot be affected or impaired collaterally.

Cocke *v.* Halsey, 16 Pet., 71.
Wilcox *v.* McConnell, 13 Pet., 498.
Voorhees *v.* U. S. Bank, 10 Pet., 449.
Gunn *v.* Plant, 94 U. S., 664.

A question properly involved which might have been raised and determined in former decision is barred by that decision.

Stockton *v.* Ford, 18 How., 418.
Aurora City *v.* West, 7 Wall., 82.

The order of October 31, 1878. *Inconsistent Claims.*

The order of October 31, 1878, constitutes an estoppel, embodying as it does the reasoning of Davis' lawyers and his allegations of fact.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted

thus to mend his hold. He is estopped from doing it by a settled principle of law."

Citing many cases.

Railway Co. *v.* McCarthy, 96 U. S., 258, 267.

Cen. Trust Co. *v.* Seasongood, 130 U. S., 482.

This Court has decided this question of estoppel in a parallel case, Phil., W. & B. R. R. Co. *v.* Howard, 13 How., 307, where a corporation sought to defend against an instrument by showing that the corporate seal was affixed thereto without due authority (p. 318), and that it was not, sealed or unsealed, intended to be the deed of the corporation. Evidence was held admissible to show that in a former suit the corporation had treated and relied upon the instrument as one bearing the corporate seal; that "on the former trial it was offered and read in evidence, and counsel stated not only to those around him, but also in conversation with the Judge, that the paper was the real contract between the parties." * * * "The plaintiff accordingly suffered a verdict to be taken against him" (p. 317).

And the Court said:

"The plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington and Susquehanna R. R. Co. This being the fact to be proved, evidence that the corporation, *through its counsel*, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible" (p. 333).

* * * * * * *

"These decisions go much further than this case "requires, because the defendant not only induced "the plaintiff to bring this action, but defeated the "action in Cecil County Court, by asserting and "maintaining this paper to be the deed of the com-"pany; and this brings the defendant within the

" principle of the common law, that when a party " asserts what he knows is false, or does not know " to be true, to another's loss and his own gain, he " is guilty of a fraud; a fraud in fact, if he knows " it to be false, fraud in law if he does not know it " to be true (Polhill *v.* Walter, 3 B. & Ad., 114; " Lobdell *v.* Baker, 1 Met., 201).

" Certainly it would not mitigate the fraud, if the " false assertions were made in a court of justice " and a meritorious suit defeated thereby. We are " clearly of opinion that the defendant cannot be " heard to say that what was asserted on the for- " mer trial was false, even if the assertion was made " by mistake. If it was a mistake, of which there " is no evidence, it was one made by the defendant, " of which he took the benefit and the plaintiff the " loss, and it is too late to correct it. It does not " carry the estoppel beyond what is strictly equita " ble, to hold that the representation which defeated " one action on a point of form should sustain " another on a like point " (336).

The parallel with this case is striking.

A deed has certain legal requisites. It must be on paper or parchment, written or printed, sealed, signed, delivered, between competent parties, and must have been made without restraint.

A deed of a corporation must be duly authorized by it and made by the proper officers.

If it lacks any of these requisite parts it is not a deed.

The document in 13 How., 305, was claimed not to be sealed by authority of the corporation, and not intended to be the deed of the corporation, that is, it was never *delivered*.

Admitting this to be all true, yet the counsel had on a former trial claimed it to be the deed of the company.

The legal conclusion that all requisites of a deed had been complied with, were asserted when it was called by counsel a deed.

In our case, a judgment has certain requisites,

among them that it shall have been recovered in a court having jurisdiction, otherwise it is null. To call it a judgment is an assertion of the legal conclusion that the Court did have jurisdiction.

The statement that a document is a deed or a judgment (without qualification) is a statement of fact, but the legal conclusions that it possessed all the requisites of such a deed or a judgment are inseparable from such a statement.

Davis stipulated in bankruptcy that "the following facts are hereby stipulated to be correct and true," and then stated that Wakelee had obtained this "judgment."

This he called a "fact." He cannot now turn around and say this is not a statement of fact, it is a statement of a legal conclusion only.

It is equally a statement of fact and of law.

The vital requisite of jurisdiction is as inseparable from the fact of its being a judgment as the soul is from the body in the make up of a man.

Then again the counsel in the P., W. & B. *v.* Howard case did just what we show Davis' counsel did in this case. While introducing the deed in evidence he said to the Court and others that that was the true deed. And the Court in the language cited showed the importance of this statement.

Davis' counsel did the same thing. After swearing to the entry of the judgment, he made argument to the Court relying upon its validity. If the word "judgment," as he used it in the petition and stipulation of facts, meant only "document having the form but not the vital requisite of a judgment," how could he claim that there had been a merger of the old debts in a void judgment?

This case is certainly parallel and has decided the point that Davis cannot now take a position inconsistent with his former position, that the judgment was valid.

I again refer to Central Trust Co. *v.* Seasongood, 130 U. S., page 482, as controlling this motion and this appeal. Therein was involved the legality of Re-

ceiver's certificates issued by authority of a decree entered by consent of appellants in a State Court having jurisdiction, *held* that the decree could not be attacked collaterally, and if the certificates should be held invalid, the appellee could not be restored to the rights under the decree of the State Court which he surrendered for them.

Here is our parallel: The order of October 31, 1876, was entered, based on an agreed statement of facts, one being that this judgment had been entered. Wakelee accepted the order, never appealed from it, was driven from the position as creditor in bankruptcy, shared not in the assets, lost all his rights to oppose the discharge when his specifications showed his power to prevent such discharge, and now Davis collaterally attacks the order he himself induced the Court to make, and makes no offer to, and cannot restore this creditor to her old rights.

I quote decisions to show that there is no chance of reversal on this point.

It has been held over and over again by the United States Supreme Court that a party cannot make inconsistent claims as to the same subject as to same parties.

A party cannot be permitted to claim under and against the same deed (Gibson *v.* Lyon, 115 U.S.,439); cannot share in fruits of contract and complain that it was fraudulent (Henshaw *v.* Bissell, 18 Wall., 255-269); cannot deny validity of contract and claim that other party is estopped by it (Watts *v.* Waddle, 6 Pet., 389).

Especially a party cannot change his position as to rulings and decisions in his favor or at his request.

Valid objection cannot be taken by defendant to jurisdiction of a suit removed to the Circuit Court by him under the Judiciary Act, Sec. 12. The defendant is in court by his own act.

Bushnell *v.* Kennedy, 9 Wall., 387.
Seward *v.* Comeau, 26 U. S., 438.

Party at whose instance the removal of a cause is effected is estopped from objecting that the removal was not made in time.

Ayers *v.* Watson, 113 U. S., 594; citing 104 U. S., 5, 17.

Trustees of bank to whom its property had been transferred on the expiration of its charter, and the bank itself, voluntarily appearing and contesting a suit, cannot deny the jurisdiction on the ground that the bank (the formal party) was dead in law.

McGoon *v.* Scales, 9 Wall., 23–31.

Where defendant states in answer under oath provisions of writing in his possession, he cannot complain that the Court acted on his admission without production.

(Citing 112 U. S., 405) Cavender *v.* Cavender, 114 U. S., 484.

Plaintiff cannot complain of an error in a ruling which was made at his request, and to prejudice of defendant.

Avendano *v.* Gay, 8 Wall., 376.

Party cannot take advantage of rulings upon exception in his own favor even if erroneous.

As often before decided, Bethel *v* Matthews, 13 Wall , 1.

Plaintiff in error cannot object that the judgment was too favorable to him, and cannot procure reversal for that reason.

Tilden *v.* Blair, 21 Wall., 241.

Where the bankrupt court orders, on application of the plaintiffs, that the Sheriff should make sale of the property of a person afterwards declared a bankrupt, levied on by him, and deposit the proceeds in the bankrupt court to wait its further order the plaintiffs cannot maintain a suit against the Sheriff for paying the money into court in pursuance of the order obtained by them.

O'Brien *v.* Weld, 92 U. S., 81.

If, as this Court holds, a party cannot aver as a defense the unconstitutionality of a statute which he once availed himself of to his benefit, how much less can Davis avail himself of the invalidity of this judgment, when he has once maintained it as good to his own advantage? This Court has held:

"The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitation, it is a conservator, and without it society could not well go on." * * *

It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect.

"*Ferguson* v. *Landrau*, 5 *Bush.* (*Ky.*) 230; *see Ferguson* v. *Landran*, 1 *Id.*, 548; *Van Hook* v. *Whitlock*, 26 *Wend.* (*N. Y.*), 43; *Lee* v. *Tillotson*, 24 *Id.*, 337; *The People* v. *Murray*, 5 *Hill* (*N. Y.*), 468; *City of Burlington* v. *Gilbert*, 31 *Iowa*, 356; *B. C. R. & M. R. R. Co.* v. *Stewart*, 39 *Id.*, 267." * * *

"Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

Daniels *v.* Tearney, 102 U. S., p. 420.

When a party has a choice of remedies, selects one, proceeds to judgment and reaps the fruit of his judgment, he cannot afterwards proceed in another suit for the same cause of action.

Kendall *v.* Stokes, 3 How., 87.

This principle that a man is bound by his election of remedies—is bound to be consistent and adhere to his choice of positions or claims, is sustained by the decisions of California (the *lex loci*).

Himmelman *v.* Sullivan, 40 Cal., 125,

and of New York (the *lex fori*).

An estoppel by judgment may not be invoked or repudiated at the pleasure of one of the parties as his interest may require.

Brooklyn City & N. R. R. Co. *v.* Nat'l B'k of N. Y., 102 U. S., 14.

"Neither can a party enjoy the rights awarded "him by a judgment whether it was void or void-"able and deny its force as an adjudication."

Validity is given by assent to a void judgment, and "by accepting the benefits which it conferred."

Mills *v.* Hoffman, 92 N. Y., 181-189.

The following case is almost parallel with that under argument where an agreed statement of facts set forth that "the plaintiff commenced an action" in California against the defendant, and notice of the pendency of the action had *been duly given by publication* and judgment was entered in default of defendant's appearance, and never arrested, reversed, reviewed or annulled, but is now a valid and unsatisfied judgment *in full force in the State*, and that it was agreed that the Court may render such judgment as is warranted by the pleadings. Held, "The agreed facts state that the judgment is now a valid and unsatisfied judgment, in full force in the State of California." * * * "If the judgment is voidable for want of service upon the defendant or notice to him, he may waive that. He does waive it by pleading the former judgment in bar of the present action * * * if he sets it up in bar of this suit he affirms the validity of that judgment against himself and *eo instanti* estopped to impeach it there afterwards."

Henderson *v.* Staniford, 105 Mass., 504.

These last two cases with others are cited by Judge Shipman in his opinion (see Record, p. 39).

When it becomes necessary to elect between inconsistent rights and remedies, the election when made will be final and cannot be reconsidered even where no injury has been done by the choice or would result from setting it aside.

Terry *v.* Munger, 121 N. Y., 161.
Steinback *v.* Relief Fire Ins. Co. (citing 114 Mass., 175), 77 N. Y., 498.

Where a person tacitly encourages an act to be done he cannot afterwards exercise his legal right in opposition to such consent if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

Swain *v.* Seamans, 9 Wall., 254, 274.

The following case is almost parallel in facts and certainly in doctrine to the case in hand: In Abbott *v.* Wilbur, 22 La. Ann., 368, it is held: "Estoppels are not favored in law, for the object of the administration of justice is to discover and apply the truth; but there may be cases in which Courts are bound to say to a litigant that he has to his own advantage or to the injury of his adversary asserted judicially what is false, and that, having done so, he must be forever forbidden to unfold for his own benefit the truth of the matter.

"This being an action to annul, for want of citation, a judgment of the Fifth District Court, and it appearing that before its institution the plaintiffs had defeated in the Third District Court a large claim of the defendant by the objection that there was then pending in the Fifth District Court a suit against them for the same demand by the same party (being the same suit in which the judgment sought to be annuled was rendered). Held, that this

amounted to an assertion that they had been cited in the Fifth District Court—an assertion made to their own benefit and the injury of the opposite party, and they could not afterwards be heard to say or permitted to prove that this assertion was false. It is not intended herein to decide that the estoppel can supply the want of citation, but merely that it prevents the plaintiffs in this case from showing that such a want exists."

The case cites as authority Phil. R. R. Co. *v.* Howard, 13 How. U. S., 335; Freeman *v.* Savage, 2 La. Ann., 269, as to a note; Devall *v.* Watterson, 18 La. Ann., 136, as to misrepresentation; Gudley *v.* Connor, 4 La. Ann., 416; Denton *v.* Erwin, 5 La. Ann., 22; Fluker *v.* Lacy, 2 La., 265, where a man bought in his own property at a sheriff's sale and was held to thereby debar himself from an action to annul the judgment, and Landey *v.* Connely, 4 R., 127, where the ground of nullity was that the Court rendering the judgment was without jurisdiction. It was held that the execution of a certain lease by a person was an acquiescence by him in the judgment which prevented an action of nullity, not on the ground that this signing of a lease could retroactively confer jurisdiction on a court, but that as an act of acquiescence it prevented an inquiry into the fact of jurisdiction.

One who obtains a judgment by pleading or representing an act or adjudication in one aspect is estopped from giving it a different and inconsistent character in another suit on same subject matter; taking advantages of a judgment in any way will estop its being reversed in error or will estop the allegation that it was fraudulent *or void.*

Pleading an erroneous judgment in bar of an action estops the party from afterwards reversing it on error.

Where a man alleges a fact in a court of justice for his advantage he shall not be allowed to contra-

dict it afterwards. It is against good morals to permit such double dealing in a court of justice.

Wills *v.* Kane (Sup. Ct. Penn.), Grant's Cases, 60.

Defendant having taken advantage of an order discharging him from arrest cannot afterward set aside that part restraining him from suit for imprisonment.

Hayward *v.* Duff, 12 C. B. N. S., 364.

Admitting a fiat in bankruptcy to be invalid petitioner cannot impeach it on the ground that he is not a trader, when he prevented the respondent from obtaining relief under another statute on sole ground that he was such a trader.

Re Mitchell, 1 D. G. B. R., 257.

Where one bought land under one judgment and thereafter bought a judgment against same debtor including amount sued for on the first judgment and received full amount of second, he was compelled to yield up the land, notwithstanding he declared at the hearing to enforce payment that he would not yield the land.

Mariner *v.* R. R. Co., 26 Wis., 84.

One cannot accept benefits of judgment and still appeal to reverse it.

Matlow *v.* Cox, 25 Tex., 578.
Ruckman *v.* Allwood, 44 Ill., 183.
Holt *v.* Rees, 46 Ill., 181.
Altoona *v.* Delaware, 44 Iowa, 201.
Kelly *v.* Bloom, 17 Abb. Pr., 229.
Bennett *v.* Van Syckel, 18 N. Y., 483.
Lentz *v.* Lamplaugh, 12 Pa., 346.
Eaton's Appeal, 83 Pa. St., 155.
Vail *v.* Remsen, 7 Paige, 206.

Acceptance of damages under an award for land for a railway estops claim of irregularity.

25 Conn., 516.

Acceptance of costs on order prevents assailing validity of order for lack of jurisdiction.

4 Exch., 187.
7 D. & L., 61.

The legal assertion of a right acquired by a decree of a court will estop a party from proceedings to invalidate such decree.

Wife brought replevin against husband. Could not afterwards invalidate divorce.

Baily *v.* Baily, 44 Penna., 274.

Accepting judgment in one's favor estops rejection of conditions therein, or asking review or denying authority which granted it.

Bradner *v.* Howard, 75 N. Y., 417.
Blackin *v.* Zeller, 52 Barb., 147.

An appeal from judgment prevents assailing it as irregular.

Irwin *v.* Nuckolls, 3 Neb., 441.

After judgment for the plaintiff in ejectment and defendant recovers judgment for taxes paid by him on the land, he is estopped from seeking relief by proceedings in error against the first judgment.

Strong *v.* Irwin, 12 Neb., 446.

An award plead in bar cannot afterward be assailed for fraud.

Ogden *v.* Rowley, 15 Ind., 56.

A plaintiff cannot stand before the Court claiming the nullity of a judgment and at the same time claim the proceeds of a sale of property made under it. (Alleged fraudulent judgment.)

Blessey *v.* Kearney, 24 La. Am., 289, citing many Louisiana decisions.

Where a judgment was entered on verbal stipulation made in open court, by which the action should abide determination of another case on appeal, and that execution should be stayed, plaintiff is estopped

from claiming right to issue execution before such determination.

Himmelman *v.* Sullivan, 40 Cal., 125.

"The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time."

Henderson *v.* Henderson, 3 Hare, 100, 115; cited with approval, Cromwell *v.* County of Sac, 94 U. S., 358.

"We are of opinion that the appellant is not in a condition to raise the question just stated.

"It was a party to the suit in the State Court, the decree in which provided for a sale of the entire road, &c. That decree, even if erroneous, was binding upon all the parties to the suit until modified or reversed by the Supreme Court of Ohio.

"It was not open to collateral attack by any of those parties in a separate suit brought by them in the Circuit Court of the United States after the jurisdiction of the State Court had attached."

* * * "The appellee cannot be restored to his rights under the decree of the State Court, and it would be inequitable to permit the appellant * * * to raise any question as to the validity of the receiver's certificate which it agreed might be issued to the appellee."

"It remained quiet for nearly two years, and until after the property had been sold, and after the sale had been confirmed to those it represented, before making an issue as to the property or validity of the order of December 8, 1883. The bondholders are concluded, under the circumstances disclosed in the record by what their representative did, or assented to being done, in order to induce the appellee

to surrender the rights secured by the judgment of the State Court."

Central Trust Co. *v.* Seasongood, 130 U. S., 482–492.

Davis waited until several months after Wakelee's time to appeal from the order of October 31, 1876, had expired and he himself had got his discharge, before he turned on Wakelee to rend him by seeking to upset and defend against the judgment as void.

Wakelee could no longer oppose his discharge nor recover the rights Davis induced him to surrender.

But a subsequent decision *contra* in a case where the subject matter and parties are different does not reverse *res judicata* in another case though erroneous.

Russell *v.* Place, 94 U. S., 606.
Campbell *v.* Rankin, 99 U. S., 261, 263.
Case *vs.* Beauregard, 101 U. S., 688, 692.
Chancellor Kent, Lyon *vs.* Richmond. 2 John Ch., 51, 59.

Consequently the subsequent decisions of the Supreme Court between other parties contrary to the decision made by the District Court in Bankruptcy October 31, 1876, do not affect the law of that case, *e. g.*, Pennoyer *v.* Neff (1877), 95 U. S., 714, which holds such a judgment as that of November 18, 1873, in question to be void, and Boynton *v.* Ball (1887), 121 U. S., 457, in which the U. S. Supreme Court first held that a claim proved in bankruptcy does not merge into a judgment obtained upon it *intermediate* the filing of the petition in bankruptcy and the discharge so as to become a new debt not affected by the discharge.

At the date of the order in question numerous diverse decisions had been rendered by various courts on the last named point, and the law was unsettled (Opinion, Shipman, *J.*, Record, p. 44).

The statements and claims of defendant's counsel on argument.

While relying confidently on the others, we urge this estoppel as well, as justly and equitably binding, even though not necessary to our case in view of the existence of the other two.

These statements and claims have been sufficiently set forth in the statement of facts.

The defendant assumes that these are mere allegations of law, and contends that he is not estopped by his counsel's representations of law. Even upon this assumption, which is not conceded, the complainant insists that defendant is estopped, especially when the Court is thereby induced to make the decision petitioned for by defendant.

On this point Bigelow has well said:

"It appears from several of the foregoing cases that there may be an estoppel by recital of a conclusion of law, as in the case of Hills *v.* Lanning, where the defendant was held estopped to deny the validity of certain patents by reason of the recitals of a deed executed between him and the plaintiff."

Indep. Order of Aid v. *Payne*, 122 *Ill.*, 625.

And there is good reason for such a doctrine. It is a settled principle of the law of contracts that the compromise of a claim doubtful in law is binding, affording a sufficient consideration for a promise to pay money.

1 *Story Contracts*, § 571, *5th Ed.*

Hence the recitals of the deed, though admitting the validity of acts or instruments which in law were invalid, will preclude the parties in an action upon the deed from contesting the same (*Libbey* v. *Pierce*, 47 *N. H.*, 394. *See St. John* v. *Roberts*, 31 *N. Y.*, 441; *Lucy* v. *Gray*, 61 *N. H.*, 151). So too in the absence of fraud or mistake a recital by deed of

the existence of a judgment is a recital of the validity of the judgment (*Blackburn* v. *Ball*, 91 *Ill.*, 434), for parties may agree to a recital which they know is not correct and bind themselves accordingly (*Ibid*).

Bigelow Estoppel, p. 375.

This subject is also well treated by the learned editor of Abbott's New Cases, notes to Vol. 23, pages 148, 167, under the head of Forensic Estoppel.

"The rule of judicial position just stated [forbidding inconsistent positions before Court] becomes developed into a matter of right of the adverse party, when he who has made a representation to the Court has thereby procured a decision unfavorable to his adversary. In such a case, irrespective of whether the decision was an adjudication constituting a technical estoppel by the record, the party prejudiced by such representation has a right to have him who made it held to it afterwards.

Morss *vs.* Osborn, 64 Barb., 543.
Bradner *vs.* Howard, 75 N. Y., 417.
Erickson *vs.* Quinn, 3 Hun, 549."

In a line with these views are the following decisions:

Evidence that, at the time of the execution of a deed, the grantor read the instrument, spoke of the absence therefrom of the words "more or less," and was informed by vendee that "it made no difference," held material and admissible.

In the same case the defendant vendee said of promissory notes to the would-be purchaser thereof that they were "all right." When suit was brought on them he was held estopped from setting up that the farm for the purchase of which the notes were given did not contain the amount of land in acres purporting to be conveyed by the deed, although he was ignorant of fact at time of his representation of the law.

Swezey *v.* Collins, 40 Iowa, 540.

In our case, *the law was very obscure*. Courts all over the land, as is admitted, had decided the law in different ways, and there was no settled law on either of the subjects declared upon by Davis' counsel.

It was under quite similar circumstances that Judge Boardman held as follows:

"I concur, believing that the *representation of the construction and effect of a written instrument of an obscure or doubtful character is equally good as an estoppel*, if believed, relied upon and acted upon, as is a disclaimer of the title to the person about to purchase."

Mattoon *v.* Young, 9 Hun, 559.

This is very sound reasoning, and the legal construction of an instrument is a *legal conclusion thus held to constitute an estoppel in pais, or equitable estoppel.*

In Calanan *v.* McClure, 47 Barb., 206, 210, it was held: "The *admissions* of a party, whether of *law* or of fact, which have been acted on by others, are conclusive against the party making them, between him and the person whose conduct he has influenced. It is of no importance whether made in express language to the person himself, or implied from the open and general conduct of the party."

The same is held in Hawley *v.* Griswold, 42 Barb., 18, 23.

And Judge Ingraham in Garnar *v.* Bird, 47 Barb., 277–291, says: "Although a mistake as to the law forms no ground for reforming a contract, yet where a party under a mistake of law or of fact does acts which mislead the adverse party he is estopped, as well as if he was not acting under such a mistake."

Now Davis' acts in applying for and obtaining the order in bankruptcy of October 31, 1876, were in themselves equitable estoppels, whether they involved a mistaken theory of the law declared or undeclared by him, and Wakelee had a right to rely upon them as such estoppels.

Davis did not merely announce a legal conclusion;

he adopted that conclusion, overcame Wakelee's opposition to it, and obtained a judgment order which was an estoppel.

And this acting on an adoption of a legal conclusion is shown in the following decision, where the possibility of knowledge of the law by the party owning the estopped right was quite equal to Wakelee's, for in Wakelee's case the law was unsettled. Davis certainly ratified the order of October 31, 1876.

Where a husband and wife were seized of an estate by entireties. The husband by will directed the land to be sold and the proceeds divided amongst his wife and children.

Land sold under order of Court and bought by two children at request of widow. Held estoppel against the wife's estate by entirety.

If from ignorance then estoppel upon the principle that when one or two innocent persons must suffer, it shall be he who caused the injury.

And the Court *held*.

It would make *no difference that the purchaser might have discovered the defect of title had he made inquiry. He has been put off his guard.* A party cannot have the price of land sold and the land itself.

If one receive the purchase money he affirms the sale whether it were void or only voidable.

Maple *v.* Kussart, 53 Penn., 348.

"There can be but one sentiment in reference to the justice of this case, and the law utters the same voice. Hewitt saw his property sold to satisfy his debt. The purchaser had the means of knowing whether the proceeding was regular and so far bid at his peril, but he paid his money in good faith, and Hewitt, with a full knowledge of all the facts, not only allowed him to pay off and satisfy the judgment, but he demanded and received the surplus which the plaintiff bid and which he paid to the sheriff for his use and benefit. By his actions he

ratified the sale and estopped himself from laying any claim to the land. I have been unable to find any case which countenances his claim and I apprehend none can be found."

Austin *v.* Loring, 63 Mo., 19, is the other way.

In Bates *v.* Hunt, 77 Ind., 355, the Court held that while ordinarily the rule is that Courts will afford no relief against mistakes of law, yet where the plaintiff's complaint showed her mistake as to her legal rights was enduced and encouraged by the misrepresentations of defendant, and was known to and taken advantage of by him, he could not, in conscience retain the benefit acquired through such mistake, and on demurrer the complaint was held good.

Here, too, it might have been said that defendant's representations were a mere opinion of the law. But the Court held him liable notwithstanding.

Hooker *v.* Hubbard, 102 Mass., 239, is another illustration. In a former action between the parties, defendant pleaded, in answer to a former note, that it had been paid by the one now in suit; and he prevailed upon this defense. He now insisted that the note in the present suit cannot be enforced against him, because it was delivered on a condition not fulfilled, and consequently never became a valid security. *Held*, that the second note could not have been effectual as a payment, unless it were a valid and binding instrument, and having treated it as such in the former action, and having then prevailed on that ground, he is now estopped to assert the contrary. "To allow him to do so would be to permit him to impute to himself a fraud on the administration of justice in the former case" (p. 241). Here the defendant might very well have contended that he should not be estopped by his opinion on the subject, but the Court held otherwise.

Favil *v.* Roberts, 50 N. Y., 222, was a case where

the defendants asserted the validity of certain legal proceedings, and on the faith of such assertion plaintiff purchased property and parted with his money. Defendants endeavored to escape liability on the ground that such assertions were representations as to the law. But the Court adjudged that they were estopped (p. 226). Here it will be observed that the proceedings in question and the will under which they were taken were as accessible to plaintiff as to defendants, but this fact did not prevent the Court from applying the estoppel.

Statements of counsel opening a case sufficiently to establish the facts stated as against his client to warrant the Court in granting a nonsuit or directing a verdict against him.

Oscanyan *v.* Winchester R. Arms Co.,
103 U. S., 261.

Comment of counsel upon the force of these decisions as applied to this case seem hardly necessary. Davis persuaded the Bankruptcy Court to adopt the doctrine of the law that he maintained. And his conduct shows that he did it with the deliberate purpose of disavowing this doctrine as soon as he got his discharge.

All these representations to the Court were made in July. The order based upon them was made the following October. These creditors out of the way, he removed the other opposers, secured his discharge in March following, and immediately proceeded to open the judgment and set up his discharge in bar of the debt.

The law required the creditor to appeal from the order of October 31st within ten days (U. S. R. S., § 4891). He did not do it.

During those ten days Davis never breathed a word of his intention to try to invalidate that judgment and bar the claim.

He waited till the time had expired and the creditor was remediless and then he turned about upon him. Was not this whole transaction in the worst

of faith? Will the Court allow itself to be used to perpetrate such a fraud upon justice?

The Court had jurisdiction.

This extends "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy. * * * To all acts, matters and things to be done under and in virtue of the bankruptcy."

U. S. Rev. Stat., § 4972.

And further it is provided that a creditor may file a specification of opposition and have the facts tried in the District Court.

U. S. R. S., § 5111.
Coit *v.* Robinson, 19 Wall., 274.

The Court had the right therefore to determine the questions presented. None of the numerous cases deciding this same point as to the merger of an old debt in a judgment recovered since the adjudication in bankruptcy contains any hint that there was no jurisdiction in the U. S. District Court to decide this question, and many of them show that the District Court actually did entertain and decide such questions affirmatively or negatively.

The order of October 31, 1876, *was a final decree.*

The appellant has declared that it was a mere interlocutory order, not a decree, and not binding as an estoppel.

The only theory on which this can be held is that a mere temporary order granted on a motion is binding only until the same issues are finally determined at trial.

The defendant's counsel has hitherto said that "an interlocutory decree is practically the end of the suit, and determines the entire rights of the parties or the principals upon which those rights are to be worked out" (*Points in reply on first demurrer, p.* 8).

Now under the Bankruptcy Act, there was no

other way of determining this question than by decision of the District Court. An appeal to the Circuit Court from such decision was provided for (*U. S. Rev. Stat.*, §§ 4980–4985), and the final judgment of the Circuit Court on appeal was conclusive (§ 4986).

Graham *v.* B., H. & E. R. R. Co., 118 U. S., 161.
Crawford *v.* Points, 13 How., 11.

No appeal shall be allowed, in any case, from the District Court to the Circuit Court, without notice given within ten days after the entry of the decree or decision (§ 4981).

Wood *v.* Bailey, 21 Wall., 640.
Ex parte Woollen, 104 U. S., 300.

It thus seems that the creditor could not wait till the order granting the discharge was entered some months after, and then appeal and carry the case to the Supreme Court, as an appeal from a final decree.

The Supreme Court has held that the method prescribed by the Bankruptcy Act is the only mode of procedure to have a creditor's claim adjudicated, and that an appeal does not lie to Supreme Court, from Circuit Court decision, on appeal from District Court decision as to creditor's claim (*Coit* v. *Robinson*, 19 *Wall.*, 274).

Hill *v.* Thompson, 94 U. S., 322.
Wiswall *v.* Campbell, 93 U. S., 347.

And Justices Bradley and Miller, in a dissenting opinion in that case (*Coit* v. *Robinson*, *supra*), declare that a decree like this is not a mere interlocutory decree, or order, but "has all the elements of a final decree, and belongs to a system of proceeding which has always been regarded in England as of equitable cognizance," and the opinion of the Court clearly regards a decree like this as terminating the controversy.

No appeal was taken. Creditor's counsel was satisfied with the decision, and was glad he lost the case (Naphtaly, Record, p. 66). The bankrupt was duly discharged without further opposition from the creditor.

Appellant's claim that the order of October 31st might have been made on any one of three theories is untenable.

Heretofore the counsel for the appellant has contended that the theory upon which the court of bankruptcy issued the order of October 31, 1876, is uncertain.

He has said that the decision could have been rendered on three distinct grounds:

1st. That the leave to sue dismissed Wakelee from the bankruptcy proceedings so that no subsequent discharge could effect Wakelee's claim, and that, therefore, he could not oppose the discharge, and he has stated the case of MacDonald *v.* Davis, 26 Hun, 53 (wherein this appellant was defendant), to show that the courts have endorsed that view in a similar case.

But the case of MacDonald *v.* Davis was not similar, for therein an action had been commenced by service of process before Davis went into bankruptcy, and it was simply stayed by the bankruptcy proceedings. Leave to continue the action was granted and judgment was obtained in California and suit brought in the New York State Court upon this judgment. MacDonald, who was a creditor, did not resist Davis' discharge and there were no estoppels created as in this case and no assertion any where of the validity of a void judgment or of the doctrine of merger. The decision in Hun was reversed in 105 N. Y., 508.

The recitations in Davis' petition in bankruptcy to the effect that Wakelee had proved up his claim in bankruptcy and obtained leave to sue and had commenced an action upon the same claim were mere allegations to show that Wakelee's proceedings in

obtaining the judgment were in all respects regular.

Under United States Revised Statutes, Sections 5105 and 5106, a creditor who has proved up his claim is by that act deemed to have waived all right of action against the debtor and is not allowed to maintain any suit therefor against him. The suit, therefore, unless brought by permission of the court in bankruptcy would be useless and a judgment obtained in such suit would be void.

The unreasonable delay on Davis' part in moving to obtain his discharge gave Wakelee the right to apply to Court and obtain leave to sue.

The leave to sue therefore was alleged as a necessary corner stone in the construction of a valid judgment.

2d. The second alternative theory advanced by appellant was that as matters stood Wakelee had two inconsistent remedies to choose between, either to remain in the bankruptcy court, or to proceed in the state and foreign courts. This is a distinction without a difference from the first theory, because the whole right of choice rested upon the leave to sue.

3d. The third alternative theory complainant likens to the second, but, it is not at all like it, being the theory upon which the bankrupt's counsel proceeded, as shown by the evidence herein, which depended not alone upon the leave to sue, but upon all the steps necessary to produce the judgment which included the leave to sue as well as the filing of the declaration and the entry of the judgment.

It is the theory, adopted by Judge Shipman, upon which this decree rests.

The election of remedies made by Davis constitutes an estoppel in pais.

Estoppels are of three general classes: estoppels by record, by deed and *in pais*. Estoppels *in pais* are divided into estoppel by contract and estoppel by conduct, and under this last head are found quasi-estoppels under the doctrine of which a party will not be permitted to assume inconsistent positions in the conduct of a litigation and in cases of election of remedies will be confined to that one of two inconsistent remedies which he first adopts in a litigation.

Bigelow Estoppel, 5th ed., pp. 4, 20, 29.

The principle on which the party is estopped by his course of action in the trial of the cause seems to be the prejudice which would result to the opposite party if the change were allowed by the Court (*Id.*, p. 81).

Among these estoppels *in pais* are included the taking the benefit of a judgment. The taking of an inconsistent position, the solemn admission of a fact in open court made with full knowledge and assent to a particular proceeding in Court given with a full knowledge of the facts (*Id.*, pp. 718–720).

All of these estoppels *in pais* are, as before shown, embodied in Davis' conduct before the Court in bankruptcy.

The same doctrine is laid down in Herman on Estoppel, Section 285, where it is well said:

"The effect of what occurs, in one judicial pro-
"ceeding upon another, is sometimes due to the
"principals of estoppel *in pais* rather than by
"record. A man who obtains or defeats a judg-
"ment by pleading, or representing an act or ad-
"judication in one aspect is estopped from giving it
"a different and inconsistent character in another
"suit founded upon the same subject matter.

"Pleading a former judgment is an estoppel or
"taking advantage of it in any other way will
"estop its being reversed on error, or alleging that
"it was fraudulent or void."

* * * * * *

"The legal assertion of a right acquired by the "judgment of a court of competent jurisdiction "made in due course of law, will estop the party in "all proceedings thereafter to invalidate the judg- "ment under which the asserted right has been "claimed."

The stipulation of facts constitutes an estoppel in pais binding on both the parties and the Court.

It has been well decided as follows:

"But the agreement of the parties bound them and concluded the Court in that proceeding, and the Court was bound as between the parties to observe, enforce and carry out the agreement. Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the Courts are bound to enforce. They may stipulate away statutory and even constitutional rights. * * * They may stipulate that the decision of a Court shall be final, and thus waive the right of appeal, and all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced, and generally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the Courts" (citing many cases).

* * * "Here the agreement of the parties was a factor which the Court was bound to recognize and to give proper weight and significance. Whatever in that agreement bound the parties bound it, and it did not err in holding that it could not, in violation of the agreement of the parties, appoint new commissioners.

"The railroad company cannot claim the benefit of a part of the agreement and repudiate the rest. If

it desires to change the commissioners it must in some way get rid of the entire agreement."

Earl, *J.* Matter of Pat. of N. Y., L. & W. R. R. Co., 98 N. Y., pp. 447-452.

This stipulation is a solemn admission of the fact that the judgment in question is valid made by Davis' counsel during the progress of the proceeding, and binding on Davis.

(2 Caines, 164); Eldred *v.* Bank, 17 U. S., 551.

Where a decision has been made based upon written agreements between the parties and their relations to each other and to the property, and the same undisputed facts are again before the Court in another action, it cannot be said that there was error in reaching the same conclusions.

Where the undisputed facts are before the Court, and upon them in the second as in the prior action the acts of the parties must be determined, the same decision will be rendered. In other words, where the facts and parties are the same, the decision will be the same, regardless of the theory.

Tauziede *v.* Jumel, 133 N. Y., 614.

Where the subject matter, facts and parties are the same, the decision will bind as to all questions that might have been decided, but where the subject matter differs, then the decision binds only as to the matter actually decided.

144 U. S., 610.

B. There was no complete, certain and adequate remedy at law. Resort to equity in aid of an action at law was necessary.

The appellee has been shown to have undoubted rights.

If the defendant had property in California sufficient to satisfy the judgment, an execution could be issued under it and the property sold.

In an action to annul or vacate the judgment, or a proceeding by Davis to enjoin the levy of execution, Wakelee could easily prevail by proving the estoppels.

If also the provision of the United States Constitution that full faith and credit shall be given in all States to the judicial records of a sister State had been interpreted to mean that the California record could be recorded anew in New York, where Davis resides and has property, and an execution issued in New York without further ceremony, then our rights could be secured in the same way.

But we have a right of property in this so-called judgment resulting from the estoppels, and there is no strength in the judgment except as derived from the estoppels.

We are obliged in New York to get a new judgment in order to issue execution, and we must base our action on the judgment and the estoppels in order to succeed.

Our case is novel, though just. A long study of the decisions does not reveal its strict parallel so far as regards the necessity of pleading the estoppels, not as a shield or defense, but as a sword on the affirmative.

But, having the right, we must be afforded the remedy.

We claimed the remedy in New York is so doubtful that we needed the injunction that was granted.

This injunction has in no respect harmed Davis, but has enforced the moralities of the case.

Davis has no moral or legal right to insist in any way that the judgment is void, and the injunction simply prevents him from doing it.

This Court, we submit, will be slow to dissolve that injunction unless we have without it a clear adequate remedy.

As Davis is a citizen and resident of New York, the action on the judgment must be brought there.

The examination of this question of remedy requires the examination of the law of pleading in actions on judgments in the State of New York.

Remedy in the New York State Courts.

(*a.*) New York has adopted the code system of practice whereunder the special law for pleading judgments is thus laid down.

N. Y. Code Civ. Proc., Sec. 532. *Judgment; how pleaded.*

"In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction."

That this section does not refer merely to the judgments of court of *special jurisdiction*, but applies to those of all courts, whether *general* or *special*, seems certain.

Section 138 of the Code of Civil Procedure, enacted 1847, re-enacted as Section 161, 1849, reads as follows:

"Section 161 [138]. In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.

"If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction." See Lansing's Code of Civil Procedure, 1874, showing all changes; Wait's Code, 1873.

The punctuation shows that the words "or officer of special jurisdiction" are parenthetical. It fol-

lows, then, that the word "court" is not limited by the words "of special jurisdiction," and must mean any court, whether of general or special jurisdiction.

When the new Code of Civil Procedure was enacted in 1877, this old section became Section 532 above quoted, and the only change made that could be claimed to touch this point was to drop the comma after "court."

This Court has decided that upon a revision of a statute a mere unsubstantial change of phraseology will not be construed as a change of law unless evidently intentional (McDonald *v.* Hovey, 110 U. S., 619).

The New York courts say that Section 532 of new Code is "simply a re enactment of Section 161 of the preceding Code."

De Nobele *v.* Lee, 47 N. Y. Super. R., 372.

This being so, of course, it governs the judgments of courts of special and of general jurisdiction.

It seems then that a judgment can be pleaded in New York in no other way than that prescribed by Section 532, *i. e.*, either by alleging that the judgment was duly given or made or to state the facts conferring jurisdiction.

The New York Supreme Court, General Term, in (1882) Horton *v.* Shipherd, 14 Weekly Dig., 453, in an action on a judgment alleged to have been obtained in the Circuit Court of Dupage Co., Ill., held—

"It was neither alleged that the judgment was duly recovered (which would have been sufficient under the liberal provisions of the Code), nor that jurisdiction in any form had been acquired by the Court rendering it over the defendant or the subject matter.

"As the case was presented by the pleadings, therefore, all that was made to appear was that a judgment had been recovered against the defendant

without any allegation or fact or circumstance indicating that he had been made a party to that proceeding by the service of any process either actually or constructively upon him. The admissions, therefore, to be derived constructively from the omission of the defendant to deny the complaint presented no case upon which the plaintiff could recover against the defendant. For the mere fact that a judgment had been pronounced followed by its assignment to the plaintiff was not sufficient in the absence of any further allegations to make out a cause of action against the defendant and a verdict should not have been directed for the plaintiff (13 Abb., 244; 17 Abb., 228; 13 How. Pr., 538)."

This is exactly our case. Ours is a foreign judgment rendered in a Court of similar jurisdiction to the Circuit Court of a county of Illinois. We must by this decision then either allege jurisdictional facts or that the judgment was duly given; otherwise the defendant need not put in any answer in order to have the complaint dismissed. He would be successful in his demurrer.

(*b.*) Although this is the only special provision on the subject in the Code yet it is doubtful whether it applies to foreign judgments as regards the general averment of jurisdiction.

The Court of final resort has not decided the question.

So far as found there are but five decisions involving the point whether it is proper to plead that a foreign judgment was *duly given.*

In Hollister *vs.* Hollister, 10 How., 532 (1854), Judge Allen, Supreme Court, Special Term, said:

"It appears to be conceded that § 161 of the Code" (old Code) "does not apply to foreign judgments, and it would seem to follow from this that a general averment of jurisdiction of a foreign tribunal would not be sufficient."

In *McLaughlin* vs. *Nichols*, 13 *Abb. Pr.*, 244 (1861), Supreme Court, General Term, said on demurrer:

"The complaint contains no averment of any facts to give jurisdiction to the Court in which the judgment was rendered. * * *

"The complaint cannot be vindicated by the Code, since it does not conform to the rule given by section 161, if that applies to foreign judgments or judgments of another State, which has been doubted."

Judge James, Supreme Court, Special Term (1864), held, that Section 161 did apply to foreign judgments in *Halstead* vs. *Black*, 17 *Abb. Pr.*, 228. Seventeen years later in *De Nobele* vs. *Lee*, 47 *N. Y. Superior Reports*, 372 (1881), the General Term of the N. Y. Superior Court said, "Whether Section 161 of the Code applied to foreign judgments of another State has been doubted (Hollister *vs.* Hollister, 10 How., 532; McLaughlin *vs.* Nichols, 13 Abb. Pr., 244), and as Section 532 of the Code of Civil Procedure is simply a re-enactment of Section 161 of the preceding Code, the doubt attaches to that."

The last case was an opinion (1882) by the Supreme Court, General Term, in *Horton* vs. *Shipherd*, 14 *Weekly Dig.*, 453.

That case was an action on a foreign judgment where there was no allegation that it had been duly recovered, nor jurisdiction in any form acquired. It was remarked *obiter* that it would have been sufficient to plead under the Code that the judgment was duly recovered.

We have thus in one case a decision at Special Term allowing a foreign judgment to be pleaded as "duly given."

We have also an *obiter* of a General Term that it may be so pleaded.

We have a decision of a Special Term and decisions of two General Terms of coequal jurisdiction, one of the Supreme Court and one of the Superior

Court, wherein it is *doubted* whether a foreign judgment can be so pleaded.

Now, who is to say what is the law in view of these contrary opinions? Will this Court decide that we must take the risk and seek justice at law relying on this assurance of what is the law by our adroit opponent, who will certainly contend to the contrary in such court of law, and try to get the Court of Appeals to sustain his view?

He has done this in the past. He maintains his right to do it. He will do it in the future.

Twice on a point of doubtful law involved in this very matter has the United States Supreme Court in other cases subsequently decided contrary to the position taken by Davis, adopted by the Court and binding on us.

These decisions were:

(1877) *Pennoyer* vs. *Neff*, 5 *Otto*, 714.
(1887) *Boynton* vs. *Ball*, 121 *U. S.*, 457.

And on these decisions he relies to defeat us on the points that the judgment was void and that the old debts did not so merge as to be a new debt not barred by the discharge in bankruptcy.

Why should we be compelled to go out of equity on a doubtful point like this to accept this suggestion of the defendant, when he will immediately turn upon us and seek to rend us?

Does not *Drexel* vs. *Berney*, 122 *U. S.*, 241, protect us and say we shall not be compelled to take this course which so many State decisions have declared to be *doubtful?*

In that case the doubt was no whit greater than in this case.

See also

Boyce vs. *Grundy*, 3 *Pet.*, 210, 215.

(c.) Again, the assertion that the judgment was *duly given or made* is not the fact. The defendant-appellant is merely estopped to show that the judgment was not duly granted or given.

A court of equity will not compel us to plead that such was the fact when it was not, especially when it is doubtful whether the state law allows us so to plead.

The Court where this judgment is recorded never had jurisdiction, and the estoppels did not retro actively confer jurisdiction.

In the parallel case (*supra*, p. 30) it was said: "It is not intended herein to decide that the estoppel can supply the want of a citation, but merely that it prevents the plaintiffs in this case from showing that such a want exists.

Abbott *v.* Wilbur, 22 La. Ann., 368.
Also Landey *v.* Conely, 4 R., 127.

(*d.*) The defendant, as authority for pleading the estoppels, has quoted the N. Y. Code of Civ. Proc., § 481: "The complaint must contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition."

But the Code governs both equity pleading and pleading at law.

N. Y. CODE CIV. PROC., SEC. 3339. *Distinctions of actions of law and in equity abolished.*

"There is only one form of civil action. The distinctions between actions in law and suits in equity and the forms of those actions and suits have been abolished."

And yet it has been held that such distinctions have not been abolished except chiefly as to form. Cases are still tried at law and in equity.

Reubens *v.* Joel, 13 N. Y., 488.

The relief demanded in the complaint does not necessarily characterize the action or limit plaintiff's remedy. Demand of judgment for damages does not preclude the recovery of the same amount by way of equitable relief.

Hale *v.* Omaha Nat. Bank, 49 N. Y., 626.
Williams *v.* Slote, 70 N. Y., 601.
Murtha *v.* Curley, 90 N. Y., 372.

"The mere fact that the complaint asks for a money judgment does not necessarily show that the case is one for trial by jury. Courts of equity give judgment for money only where that is all the relief needed (Murtha *v.* Curley, 90 N. Y., 372)."

Bell *v.* Merrifield, 109 N. Y., 202.

Of course in equity we could always have plead all the facts, including estoppels, but in law we could not, and even under code practice it is still doubtful, as shown below.

The Code also declares (§ 532) that in suing upon a judgment the jurisdictional facts must be set forth or the judgment may be simply stated to have been duly made or given.

This last provision is specific. We cannot take a general rule like the first (§ 481) and say that it overrides the second, which is specially applicable to suits upon judgments. If we cannot set up either jurisdictional facts or that the judgment was duly given, would the estoppel save us under Code, § 532?

We also maintain that this provision, Sec. 481, will not control a United States court of equity and cause it to refuse us relief, because the rule laid down in Sec. 481 did not exist at common law, and, therefore, cannot be considered herein. [See cases cited, *supra.*]

It remains then under Section 532, New York Code Civil Procedure, to adopt the other alternative to state the facts conferring jurisdiction.

As we have seen there were no such facts, we should have to depend upon the estoppels *in pais* created by Davis' election of remedies and positions in Court inconsistent with the treatment of the judgment as void.

It will not do to plead the facts constituting the estoppels as substitutes for the jurisdictional facts.

It was not possible at common law to plead equitable estoppels in the declaration. The right of action lay upon the original instrument, and that alone must have been pleaded.

Estoppels *in pais*, if pleaded, were demurrable as matter constituting evidence not proper in the pleading.

There was no way at common law by which estoppels such as these could be pleaded in a declaration so as to be available in place of the jurisdictional facts.

"The plaintiff cannot be said to have opportunity to plead an estoppel, and voluntarily to omit to do so, when the previous pleadings are such that if he did plead it, it would be demurrable."

Phil. W. & B. R. R. Co. *v.* Howard, 13 How., 305, 336.

"Such estoppels cannot be pleaded, but are given in evidence to the Court and jury."

Welland Canal Co. *v.* Hathaway, 8 Wend., N. Y., 481.

Bank *v.* Wollaston, 3 Harrington, 90.

Furthermore, the old maxim that an estoppel is to be "used as a shield not as a sword" shows that it is not to be pleaded as a cause of action. In the face of the New York decision and in face of the confusion of decisions in other States on the same subject I submit that this Court will not say that the New York courts must decide this or that to be the law in New York when the question comes before them and will not compel us to take a doubtful course in pleading.

The confusion of decisions on this subject in other States is shown by those rendered in Maxwell *v.* Longenecker, 89 Ill., 102; Clausen *v.* Jones, 100 Ind., 102; Ransom *v.* Stanberry, 22 Ia., 324, advanced below by appellant's counsel as containing *intimations* "that estoppels may be pleaded as a constituent element in a cause of action at law."

The contrary, however, has been held in Caldwell *v.* Auger, 4 Minn., 217, where the Judge says: "The pleading of the statement of Herbert in the

answer would, in fact, be *pleading the proof, which under any system would be bad*," holding that estoppel *in pais* is evidence, not pleading. (So too Coleman *v.* Pearce, 26 Minn., 123; Hostler *v.* Hays, 3 Cal., 302; 75 Wisc., 554.)

Notwithstanding the position counsel now takes, he has in the Court below admitted that these estoppels cannot be pleaded in the complaint, but would on motion be stricken out as evidence.

In his first Brief on Demurrer, p. 20, he says:

"Perhaps it is true, as stated by the complain-
"ant's counsel upon the oral argument, that under
"the rules of pleading in this State the complainant
"would not be permitted to plead the facts which
"constitute this estoppel."

In his second Brief on Demurrer, p. 10, he says:

"The jurisdiction, however, of the Court of Law
"to entertain the suit must be found in the facts
"other than the estoppel, and for the purposes of
"determining the jurisdiction of the Court the
"estoppel must be laid out of consideration.

"The same is equally true in a suit in equity,
"provided no equitable relief by decree is asked or
"got by reason of the estoppel. The only right
"complainant has to set out the estoppel in the
"bill of complaint is because it does form the basis
"for asking and securing equitable relief by way of
"decree. If the estoppel is set out in the bill for
"any other purpose, as, for example, to secure
"some advantage during the progress of the suit,
"then complainant has no more right to set out the
"estoppel in his bill of complaint than he has to
"set it out in a declaration or complaint in an ac-
"tion at law.

"If the estoppel is not set out as the basis for a
"decree granting equitable relief, then it is imma-
"terial, and so should be stricken out of the bill,
"just as it should be stricken out of a complaint in
"an action at law; and we submit that correct prac-

" tice would require this Court, on motion, to strike " out the facts pleaded as an estoppel in each of " these bills, since complainant asks no equitable " relief, but only a money judgment."

So, too, in his fourth Brief on Demurrer, p. 4, he states:

" He (complainant) alleges that the estoppels " cannot be made a part of the statement, and that, " therefore, the cause of action must be upon the " judgment alone, and this certainly bears out to " the letter the assertion made by us in our brief."

And Judge Shipman's opinion shows the defendant-appellant's position below:

" The ground of equity in this part of the case is the averment which was once conceded by the defendant in argument to be true, and which we therefore assume to be true, that in an action at law upon a judgment in the State of New York it is necessary to allege in the complaint either the facts showing the jurisdiction of the court in which the judgment was entered or that it was duly entered, and unless this is done the complaint will be dismissed on demurrer. It thus appears that it is uncertain whether Cornwall (Wakelee) could so frame his complaint as to be able to obtain a standing in a court of law unless Davis should be prevented from taking advantage of the defective jurisdiction of the California Court, and that it is improbable that the plaintiff could, at the outset of his case, avail himself of this estoppel so as to gain a foothold in court.

It follows that a case is stated in that part of the bill which relates to the defense of the invalidity of the judgment which entitles the complainant to relief in a court of equity (Drexel *vs.* Berney, 122 U. S., 241)." (Rec., p. 43.)

And the report of the case just cited in the opinion closes with this remark: * * * "And because

it appears to be altogether uncertain whether the appellants can avail themselves in the action brought against them at law of the defense asserted in this bill and admitted by the demurrer to be true, we think the demurrer should have been overruled and the defendant required to answer."

C. The appeal was taken merely for purposes of delay.

The act creating the United States Circuit Courts of Appeal was passed March 3, 1891. The decree herein was entered March 9, 1891. The appeal to this Court was taken April 16, 1891. If it had been taken to the new Circuit Court of Appeals, it would have been disposed of three years sooner than in this Court.

This course must have been adopted for delay only.

It is quite clear that the merits of the case are on Wakelee's side. Davis judicially admitted the justice of the claim in the court of bankruptcy eighteen years ago. It matters not to him how he shall be compelled to pay the claim, whether by aid of equity or not. Yet he purposely prolongs the litigation by appealing to this Court on a technicality.

D. The objections to the evidence should be overruled.

The objections (Rec., p. 50, and the first on page 51) were made to the admission of extracts from defendant's briefs used before last amendment of complaint, introduced to show defendant's threats, &c.

They were properly introduced. In equity facts occurring up to time of decree can be proven; not so at law, where the judgment speaks from the commencement of action.

Besides the same evidence appears all through the case.

The last two objections (Rec., p. 51, and that on page 53), are of no weight. The records of the other

suits were introduced (Rec., p. 87) without objection. The evidence of Maltby is simply explanatory of them.

The objections (Rec., pp. 56, 57) are not important. Witness could not be expected to remember exact language of counsel twelve years after date. His memory is corroborated by defendant's witness Thompson (Rec., pp. 84–5), which was not objected to.

The evidence was material and relevant to explain the questions of law submitted to the Court for decision of October 31, 1876, which did not fully appear in the record.

The objection (Rec., p. 59) to the introduction of the transcript of the action in California State Court showing how Davis turned about after obtaining his discharge, and sought to overturn as void the judgment which he had maintained as valid and persuaded the Court to so decide, is so evidently without strength that it need not be argued. The testimony reaches the heart of the litigation, and goes to show his fraud on the Court.

The matter objected to (p. 60) goes to show that Wakelee was diligent, and coupled with the long tying up of the California case on appeal till 1881, justifies Wakelee in discontinuing a case distant one-quarter round the globe from him.

The objection (Rec., p. 63) is the same as those on pages 56, 57, and is overcome in the same way.

So also the first objection (Rec., p. 64).

The objection to Q. 32, page 64, is an objection to a question of no importance to the rendering of the decree.

The objection (Rec., p. 67) to the introduction of the notes of argument is plainly futile in the face of the numerous decisions cited in this brief holding that where the record does not show what questions are submitted and decided by an order or decree extrinsic evidence may be given.

E. Damages, interest and costs, should be awarded to appellee.

F. The decree should be affirmed and the appeal dismissed.

I submit:

(1.) That it is quite clear Davis is estopped from denying that the judgment of November 18, 1872, is valid and in full force; that every argument to the contrary is frivolous and the principle involved has often been decided by this Court;

(2.) That it is equally clear that the decisions of New York render it so doubtful as to how the complaint at law shall be drawn that even appellant if he maintains the contrary will be driven now into contradicting his own briefs below and thus will show the doubt in higher relief. That Judge Shipman's opinion also recites that this ground of equity is conceded by Davis, and after such concession we submit the defendant had no right to appeal against that admitted doctrine, and if he had, he was fully aware of the doubt existing if he is honest in both his positions;

(3.) That it follows then in view of the certainty of the first proposition and the acknowledged doubtfulness of the law set up in the second proposition, this appeal must have been taken without hope save only for delay.

Respectfully submitted,

ANSON MALTBY,
Counsel for Appellee.

137650

Hamilton Print, 12 Bar

Supreme Court of the United States.

ERWIN DAVIS,

Appellant,

against

ANGELICA WAKELEE,

Appellee.

No. 181.

Memorandum in Reply to Appellee's Brief.

A.

With respect to appellee's contention that there was no complete, certain and adequate remedy at law.

The appellee considers this question in only a few pages of her brief, beginning at page 48.

Her claim is that in suing at law in New York on the California judgment she must be governed by the provisions of Section 532 of the Code, and that this section of the Code applies to pleading on judgments of courts of general jurisdiction.

We have considered this so fully in our brief that we will not repeat what we have there said.

The law is quite the contrary. This section of the Code does not apply at all to pleading on judg-

ments of courts of general jurisdiction. This is clearly established by the authorities we have already cited.

The complainant next contends that it is *doubtful* whether this section of the Code applies to pleading on *foreign* judgments.

Our answer to this is the same as we have given in our brief, namely, that it is immaterial whether this section of the Code applies to pleading on foreign judgments, because the foreign judgments there referred to are only judgments of courts of *special* or *limited* jurisdiction.

In the very cases which question whether this section of the Code applies to pleading on foreign judgments, an examination of the facts will disclose that the foreign judgments considered were judgments of courts of *special* jurisdiction, and in these very cases the rule is laid down that the section has nothing to do with pleadings on judgments of courts of *general* jurisdiction.

Complainant also contends that, assuming the Code applies, she cannot plead that the judgment was duly given, because this would not be the truth.

Our answer to this is the same as before, namely, that if the Code applies, she can plead the legal effect of what facts she would utilize upon the trial as evidence. To do this would not be perjury and is the usual mode of pleading. If she desires she need not verify the complaint.

Complainant next asserts that the estoppels cannot be pleaded in a complaint at law.

We have already shown that the contrary is true by numerous decisions in New York and other States of the Union.

The complainant quotes certain parts of alleged briefs which she claims were submitted by Mr. Davis in the court below (see pages 58 and 59, Appellee's Brief).

These quotations are made to show that Mr. Davis has conceded that the remedy at law is doubtful.

This contention is absurd. The *very point* of the demurrer in the court below was that the complainant could properly plead at law, and that she had a *clear, adequate and complete remedy at law.*

In these briefs these extracts are simply arguments which assume different views of the law and the facts, so as to consider varying theories. There is no admission or concession.

The statement extracted from page 20 of Davis's first brief on demurrer (see page 58 of Appellee's brief) simply refers to pleading estoppels and states, "perhaps it is true" that they cannot be pleaded.

This is no admission. This is mere argument of one of several alternative propositions.

Furthermore, the demurrer referred to was the *first* demurrer where the complaint in this suit, although in form in equity, asked merely for a money judgment, and the pleading of estoppels referred to was in this *equity* action, not in an action at law at all.

The same is true of the second extract made on page 58 of appellee's brief.

The demurrer referred to was the demurrer to the *first* complaint in this suit, which demanded simply a money judgment. The argument was there addressed to the validity of that complaint. The argument was not addressed to pleading estoppels in a *declaration* or *complaint at law.*

The third extract, made on page 59, referred to the argument on the second demurrer. Mr. Davis's argument had been that the cause of action must be upon the judgment alone; and in the brief, in commenting upon the appellee's statement, it was stated that the appellee "certainly bears out to the letter the assertion made by us in our brief,"

to wit, namely, that the action must be upon the judgment alone. This does not concede that *estoppels* cannot *also* be pleaded.

These extracts, therefore, do not show that Mr. Davis ever admitted that the remedy at law was doubtful.

Quite the contrary was the case.

In all the briefs filed on the first and second demurrers Mr. Davis made the points that estoppels *could* be pleaded in a *declaration at law*, and also that *if* the Code applied to pleading, the plaintiff, in an action *at law*, could set out that the judgment was *duly* recovered, because this would be a mere allegation, not of the actual, but of the legal, fact, which could be proved by proving the facts constituting the estoppels.

Mr. Davis also made the same argument in his brief filed in this court in opposition to the motion to dismiss this appeal.

Judge Shipman's opinion states no admission that in any way affects Mr. Davis. Suppose we had previously claimed that the complaint at law must allege that the judgment was duly recovered. Now, it is a fact that such an allegation would not be demurrable and could be truthfully pleaded. Hence, the complainant has an adequate remedy at law. Suppose it be the fact that we had previously conceded that the complaint must allege facts showing the jurisdiction of the court. A complaint alleging the recovery of a judgment in a court of general jurisdiction would be setting forth such facts, and such a complaint would not be demurrable.

Thus, even if we had previously conceded the questions referred to by Judge Shipman, this does not injure, but in fact helps, Mr. Davis, for such a mode of pleading is not doubtful, *if* the Code applies, and if it does not apply, then the common law mode of pleading does apply.

There is nothing, therefore, in the nature of any

concession by Mr. Davis of the *equity of the bill* or of the doubtfulness of the remedy at law.

On the contrary, the very demurrers were based upon want of equity, for the reason that complainant, *in one manner or another*, could properly set forth a good cause of action at law which would not be demurrable, whether the Code applied or not.

AND COMPLAINANT, WHEN SHE SUED AT LAW, SETS OUT *four* SEPARATE CAUSES OF ACTION, ALL UPON THESE DIFFERENT THEORIES, AND ALL OF WHICH WERE PROPERLY PLEADED.

Mr. Davis never conceded that there was any equity in this case, and Judge Shipman's opinion itself shows that on the argument of the demurrer before him, Mr. Davis contended that there *was* no equity in the case; Judge Shipman said he would assume that the Code applied. As a matter of fact, Mr. Davis's counsel was arguing before Judge Shipman that assuming it *did* apply, the plaintiff could properly plead under it, and hence the remedy at law was *not* doubtful, and this court cannot spell out of the extracts from these briefs any concession of the equity of this bill.

The appellee, on the question of want of equity, has entirely failed to meet the argument which we have set forth in our brief in Points I to IV inclusive.

B.

With respect to appellee's contention that Mr. Davis was estopped to deny the judgment of November 18, 1873.

We have little to say with respect to this argument in the appellee's brief. As we supposed, the appellee has referred to cases which we have discussed in our Point IX. These cases all fall readily under the four classes which we there specify. The cases cited to show that there was an estoppel have nothing to do with this case. They do not meet the facts of this litigation at all.

Furthermore, the brief of the appellee in no way answers or meets the points we have made, namely, Points V to VIII inclusive. The appellee has not shown, and cannot show, that there was an estoppel either of record or *in pais*. We deem it a work of supererogation to say anything further than we have already said in our brief on these points.

C.

Observations on appellant's printed answer to some of our points in our original brief.

The appellant's answer to our brief having been submitted to us, there is time to make a few observations upon it. On page 1 of the answer, on the question of lack of equity, the appellant says *nothing*, does not make any answer to our argument at page 8 of our brief, nor does he deny the validity of the cases there cited.

At page 1 of the answer, on the question of our argument respecting the suit being one to declare future rights, appellant does not deny the validity of the case of Cross *v.* De Valle, 1 Wall., 1, but says that an injunction is needed because evil is impending, and is threatened by Davis.

This is *amusing*. *Davis* was not doing the threatening, he was resting quietly on his rights. All the threats, suits and proceedings, which doubtless are evils, have proceeded from the *appellee*. If any injunction is needed because of threats, it should be one against appellee.

With respect to our point on page 12 of our brief, that there is no action at law possible because the judgment is dead, the appellee makes no answer at at all. Nor does she make any answer to our point on page 16 of our brief, that for another reason the judgment is non-existent, viz., because of the discharge in bankruptcy

Appellee devotes several pages, 2 to 4, inclusive, in trying to show that it is doubtful whether, in a complaint at law, estoppels can be pleaded.

Now our argument was that (1). Wakelee could plead at law under the rules of the common law without any aid from equity or the Code (see our brief, page 24). (2). That if the Code applied, Wakelee could plead.

(*a*). That the judgment was duly recovered, or

(*b*). Wakelee could set out jurisdictional facts.

We claimed that *if* the Code applied, plaintiff could plead the legal effect of what would be established by introducing the estoppels in evidence, and that therefore it would be legally *true* to so plead.

Now, no answer is made to these two contentions, especially the first. Appellee devotes herself to showing that estoppels cannot be pleaded in a complaint at law. Is not this an implied admission that in the two other modes first stated a proper complaint could be drawn at law?

At page 3 of appellee's answer, on the question of pleading estoppels, appellee mentions various cases which we cited, and says that they refer to pleading in answers or replies or in equity suits.

She, however, carefully avoids mentioning the following cases which clearly show that such a manner of pleading in a declaration is authorized, namely, the other cases we cited, to wit:

Maxwell v. *Longenecker*, 89, Ill., 102.
Ransom v. *Stanberry*, 22 Iowa, 334.
Extracts from Chitty and from Coke.
Davis v. *Davis*, 26 Cal., 23.
Folsom v. *Star Union Line*, 54 Iowa, 490.

Phillips v. *Van Schaick*, 37 Iowa, 229.
Gooding v. *Underwood*, 89 Mich., 187.
Pearson v. *Hardin*, 95 Mich., 360.
Dale v. *Turner*, 34 Mich., 405.

Hence, the rule we contend for that estoppels can be so pleaded is sustained, not only in New York, but also in Illinois, Iowa, California and Michigan, and is *not disproved* by any of the cases cited by appellee, or commented on by her.

At page 5 of the answer appellee, to show that it is doubtful whether the Code applies to pleading on foreign judgments, still relies, *much to our surprise*, upon McLaughlin *v.* Nichols, 13 Abb. Pr., 244, and Halstead *v.* Black, 17 Abb. Pr., 228.

In the first case the Court distinctly stated as follows:

> "If the court in which the judgment was recovered be one of general jurisdiction, it will be presumed to have had or acquired jurisdiction of the case. *But if it be an inferior and limited jurisdiction, then the rule is that facts to show jurisdiction of the subject, as well as of the person, must be averred.*" * * * "We are not informed by this pleading of the jurisdiction of the Warren County Circuit Court in New Jersey." * * * "It is not stated whether it is a court of general or limited jurisdiction."

This case shows that the only question was whether the New Jersey court was of limited jurisdiction. If it had appeared that it was of general jurisdiction, then the Code rule would have applied.

In the second case cited, Halstead *v.* Black, it was *distinctly held* that the Code did apply to pleading on foreign judgments. We cannot understand how the appellee again printed these cases to sustain a contention contrary to what they actually decided.

Appellee's attempted answer to our points concerning the questions of estoppel is no answer at

all. We have so fully considered this question that we will not now make any further comments, except that appellee has very carefully avoided answering our main arguments, among others, the one at page 84 of our brief, to the effect that an estoppel must be mutual, and especially that at page 85 of our brief, showing that there could be no estoppel, because this second proceeding was for a different cause of action.

We are further impelled to make no more extended argument than we have already done on the questions of estoppel, because at page 12 of appellee's answer she seems to abandon any claim that there is an estoppel either of record or in *pais*. She says, "His representations in pleading *may or may not bind him* as towards the adverse party, but *even if they do not*, the case may be such that the Court," etc. Appellant endeavors to maintain her rights by invoking the doctrine of the election of remedies or inconsistency of positions.

These doctrines have nothing to do with the present litigation. The only remedy Davis elected was to move to dismiss instead of answering the specifications of opposition. Having adopted one course he could not take the other. That is the only election of remedy or inconsistency of position which the whole record can possibly disclose (see our discussion on this point at page 150 of our brief).

Davis never adopted, ratified, asserted or affirmed the judgment, nor did he make it the basis of any proceeding. Both parties, for the purposes of argument, assumed the judgment was in force, and hence the decision.

Summary.

It seems to us that appellee has waived her whole position. She does not seem to strenuously urge any longer that the remedy at law is doubtful, and how

can she, when she actually sued at law by the same attorney and in the very modes which we in our brief have claimed were proper modes of suing at law. And yet in the bill in this case by the same attorney she claims that she cannot so sue.

Appellee seems to have also abandoned any claim that there is any estoppel of record or in *pais*, and it is very clear that the doctrine of election of remedies or inconsistency of positions has nothing to do with the present litigation.

It seems to us, therefore, that appellee either by her conduct, or by her admissions, or by the lack of any strenuous argument, or by failure to answer our main argu ments, has practically come before this Court conceding that she has no rights against Mr. Davis either in law or in equity.

D.

The bill should have been dismissed, because the claim was stale and in view of the laches of the appellee.

The judgment was recovered in California November 18th, 1873. The argument of the motion took place July 20th, 1876, and the order dismissing the specifications of opposition was entered October 31st, 1876.

The same is true with respect to the other suit of Davis *v.* Cornwall (appeal, No. 182), except that the judgment was entered earlier, namely, December 18th, 1872.

Taking the judgment in this case entered November 18th, 1873, it was void. Wakelee had no rights under it, nor could any suit have been brought upon it. This situation of affairs continued until 1876. In that year appellee claims Davis affirmed, accepted, or in effect promised to pay the void judgment.

If appellee or her predecessor have any rights at all, they first accrued then *in the year 1876*. What

occurred in 1876 could not by any possibility make *valid* the judgment which was void, but, if anything, only gave the appellee or her predecessor a new cause of action predicated upon the new promise, or affirmation of the judgment, first made in 1876.

The case is analogous to that where an infant's contract is void or voidable, but is ratified by the infant after majority.

In such case the cause of action arises upon the making of the *new promise* and is barred at the expiration of six years from that time (see Halsey *v.* Reid, 4 Hun. 777).

The case is also analogous to that where a person reacknowledges a debt which has been barred by the Statute of Limitations. This is a new promise, and the cause of action arises upon this.

> *Danforth* v. *Culver*, 11 Johnson, 146.
> *Lounsdale* v. *Brown*, 4 Wash. (U. S.). 149.
> *Little* v. *Blunt*, 9 Pick, 488.
> *Carr* v. *Robinson*, 8 Bush (Ky.), 269.

In none of these or similar cases does the new promise or affirmation make the statute run from the time of the *original indebtedness*. Suit must be begun within six years (or the statutory period) after the new promise.

Suppose that this void judgment against Davis had been recovered in 1840, and in 1876 these representations were made. If they were to have any effect, so as to enable Wakelee to enforce the judgment, the effect must be something more than to make the judgment valid; because, if the judgment of 1840 was made valid and the cause of action was predicated upon it, still, nevertheless, in spite of what was said or done in 1876, the judgment, having been recovered in 1840, would be barred in 1860, and no suit could be brought on it in 1876, in spite of what happened, in that year.

It is, therefore, clear that, whatever occurred in 1876 which might be claimed to have a tendency to be a new promise or affirmation of the judgment, would be a creation, for the first time, of a cause of action in law or in equity.

It being clear, then, that, not later than October 31st, 1876, Wakelee, if he had any cause of action at all, then first had his cause of action, if suit was to be brought in New York, it should have been brought either within the time limited by the *Statutes of New York State*, or within such time as would not be considered by courts of equity a *practical abandonment of the action*.

(1). The complainant having, if at all, a cause of action, first accruing in 1876, by not having instituted this proceeding in New York until 1888, should be dismissed out of court because of the *staleness* of the claim and because of the great *laches* in enforcing it.

The Courts of the United States, wholly apart and independent of the statutes of limitations, will dismiss a suit in equity, if, under the circumstances of the particular case, the claim is stale (Wood on Limitations, pp. 148-160).

In the case of Sullivan *v.* the Portland and Kennebec Railroad Company, 94 U. S., 806, this doctrine is well illustrated.

This was a suit in equity and there had been 17 years' delay by the complainant. This court, wholly ignoring the question of the statute of limitations, held that they would apply the doctrine of laches and would dismiss the bill. The Court held that *it was not necessary for the defendant to plead these facts by answer or demurrer*. The Court said:

> "To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the an-

swer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

Wilson v. *Anthony*, 19 Barber (Ark.), 16.
Taylor v. *Adams*, 14 *id.*, 62.
Johnson v. *Johnson*, 5 Ala., 90.
Ferson v. *Sanger*, 2 Ware, 256.
Fisher v. *Boody*, 1 Curtis, 219.
Cholmondly v. *Clinton*, 2 Jac. & Walk., 141.
2 *Story's Eq.*, sect., 1520a.

'A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.'

Smith v. *Clay*, Ambler, 645."

In Piatt *v.* Vattier, 9 Peters, 416, the same rule is laid down. This was an equity action. The Statute of Limitations was not pleaded. This Court, on similar grounds of lapse of time, held that this was a bar to the suit, and affirmed the decree dismissing the bill.

So, also, in Etting *v.* Marx, 4 Fed. Rep., 673. This was an equity suit, and for *twelve* years it appeared that the complainant had taken no action upon his claim.

To the same effect see also Elmendorf *v.* Taylor, 10 Wheat., 360; Badger *v.* Badger, 12 Wall., 87; Wagner *v.* Baird, 7 How., 234.

Such being the law, what are the facts of the present case. This suit was not begun until over fifteen years after the judgment was entered; until over twelve years after the order dismissing the specifications of opposition was entered. The decree in this suit was made more than fifteen years after the entry of this order; and this year of our Lord, 1895, is nineteen years after the entry of the order, and twenty-two years after the entry of the judgment.

Meanwhile evidence becomes lost, witnesses die, and in spite of this fact, complainant has slept upon her rights.

She knew that Davis, very shortly after 1876, *threatened* to defend against the judgment because it was void.

On March 7th, 1877 (Rec., page 47, par. XXII, page 25, page 88), Davis moved to set aside this judgment on the ground that it was *void*.

On April 19th, 1877, in England, Davis answered a suit brought by Wakelee, claiming that the judgment was *void* (Record, pages 88 and 89).

These facts are commented on also by appellee's counsel in appellee's brief, page 12.

So it is clear that complainant knew, as early as *1877*, that Davis was *threatening* to defend against the judgment on the ground of its invalidity. If she or her predecessor had any right to an INJUNCTION, they certainly had it in *1877*. This suit could have been brought then against Davis in New York, where he lived; but no; they wait until 1888, the suit proceeds until 1891, and, meanwhile, in-

stead of all the facts being fresh in the recollection of the witnesses, this long period of time has lapsed during which the complainant has slept upon her rights, and the defendant's case has been prejudiced by this long delay.

Bruce *v.* Tilson, 25 N. Y., 194, holds that the statute runs from the time when the plaintiff might have brought his equity suit, and was first charged with notice that his rights are denied.

Under these circumstances we submit that this court should dismiss the bill for this reason alone.

(2). This Court should also dismiss the bill because under the Statutes of New York this action is barred.

This is a suit in equity. The Code of New York, Section 388, provides as follows, with respect to equity actions:

> "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues."

We have seen that the cause of action accrued in 1876, or at most, in 1877. This action was not brought until 1888.

Now, the fact that the cause of action was barred appeared upon the *face of the bill*, and all the facts were there set forth that we have detailed.

We have *demurred* to the bill, and where the fact that the suit is barred by the Statute of Limitations appears on the face of the bill, a demurrer raises this objection.

> *Upton* v. *McLaughlin*, 105 U. S., 664.
> *State of Rhode Island* v. *State of Massachusetts*, 15 Peters, 269.

Upon the grounds, then, that this suit is stale, that complainant has been guilty of laches, and

upon the defence properly raised by demurrer of the Statute of Limitations, we submit that the bill should be dismissed.

(3). FURTHERMORE, it appears on the face of the bill that there can be *no action at law possible* against Mr. Davis on these facts. The cause of action at law, if any, accrued in *1876*, when the representations were made, and this cause of action not being upon a sealed instrument or a judgment, but being upon a new, express, or implied promise, would be barred in New York in six years (see New York Code of Civil Procedure, Section 382).

There cannot possibly be any cause of action at law. This suit in equity is entirely without foundation.

E.

We respectfully submit that the decrees in both appeals should be wholly reversed with costs.

Respectfully submitted.

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EVENING POST JOB PRINTING HOUSE—N. Y.

Office Supreme Court, U. S.
FILED.
JAN 21 1895
JAMES H. McKENNEY,
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Supreme Court of the United States.

ERWIN DAVIS,
Appellant,

vs.

ANGELICA WAKELEE,
Appellee.

No. 181.

APPELLEE'S ANSWER TO SOME OF APPELLANT'S POINTS.

Appellant's brief having been submitted to appellee, there is time to answer some of the points made therein, taking appellant's own numbering.

Point I.—(p. 8.) *Lack of equity in the suit*—has been fully considered in our brief.

Point II.—(p. 11.) *The bill shows such lack; reasons why:*

(*A.*) (p. 11.) *The decree declares future rights and affects an action at law not in esse.*

Citation: Cross *v.* De Valle, 1 Wall., 1, where the rights of unborn children were to be affected. An extreme case.

Here we have been in hot litigation in different courts, States and countries since 1869, Davis at every opportunity seeking to thwart our collection of this debt by maintaining, ever since 1876, in various actions, that the judgment is void (Rec., pp. 86-89). Proof that suit is to be brought (Rec., p. 51), threats, briefs on demurrer (Rec., p. 50) in this very case showing such contention.

All this fulfills the requirement that the evil to be enjoined must be impending—threatened.

Truly *v.* Wanzer, 5 How., 141.

2 (p. 16). *The judgment was void, as shown by record, because the leave to sue required as a condition jurisdiction in the Courts of Davis' person and property; condition unfulfilled.*

The stipulation of facts and the petition asserted the recovery of a judgment which necessarily involved such jurisdiction. Davis is estopped to deny it.

3 (p. 16). *Effect of discharge.* Treated elsewhere. Sub-points that there are no estoppels of record or *in pais* reappear more fully under *Point V.*, Appellant's Brief.

Point III.—(p. 21.) *There was an adequate remedy at law.*

This point has been controverted in our first brief, but some subpoints may be further answered.

At pages 33-35 appellant states that the leading New York decision in Welland Canal Co. *v.* Hathaway, 8 Wend., 481, to the effect that estoppels cannot be pleaded, was overruled by later cases.

Not so. In that case the estoppel, if pleaded, would have appeared affirmatively in the declaration, and used as a sword.

The other cases refer to estoppels plead in answer or reply as a defense, and used as a shield.

Gaylord *v.* Van Loan, 15 Wend., 308, as quoted on appellant's brief (p. 35), shows that the estoppels were there plead in a reply.

The same was the case in Ins. Co. *v.* Bloodgood, 4 Wend., 652. So, too, in People *v.* Bristol Road, 23 Wend., 222.

We have never contended that an estoppel could not be used as a defense.

It follows that the case of Welland Canal Co. *v.* Hathaway remains unaffected as the law of New York.

Whether it may be overruled hereafter we do not know, and are not concerned about it.

Appellant has cited many cases from many States where code pleading has been adopted, but these decisions do not bind New York courts. The citations are carelessly made, many of the decisions are *in equity*, most of them concerning answers or replies, *i. e.:*

Gill *v.* Rice, 13 Wis., 549—in equity.

Warder *v.* Baldwin, 51 Wis., 450—defense.

Maynerd *v.* Firemen's, &c., 34 Cal., 48—no estoppel.

Ind. Dist. of B. *v.* Merchants', &c., B'k, 68 Iowa, 343—defense.

Palmer *v.* Hayes, 112 Ind., 289—defense.

Peter *v.* Grippee, 108 Ind., 121—reply.

Greenup *v.* Crooks, 50 Ind., 410—in defense.

Robbins *v.* Magee, 76 Ind., 381—answer.

Sims *v.* The City, 79 Ind., 446—in equity.

City *v.* Startzman, 104 Ind., 343—in equity.

Clauser *v.* Jones, 100 Ind., 123—answer.
Bray *v.* Marshal, 75 Mo., 327—answer.
Heirs, &c., *v.* Nichols, 33 La. Ann., 747—answer.
Texas Bank Co. *v.* Hutchins, 53 Tex., 61—replication.

All these are worthless citations. Thus Wisconsin, California, Missouri, Louisiana and Texas are eliminated from the list of States quoted against the rule in *Welland* v. *Hathaway.*

The case of Maxwell *v.* Longenecker, 89 Ill., 102; 82 Ill., 308, does not treat of pleading an estoppel. The defendant had promised to pay the indebtedness of another. That should have been the ground of action. It was not plead, therefore evidence was excluded. There was no question of an estoppel.

(3) (p. 42). *That complainant plead the legal effect.*

Our answer is this:

At common law plaintiff, who relies on supporting what defendant calls legal effect, by his ability to show that defendant was equitably estopped to show its untruth, *could not plead* the facts raising the estoppel, because he was not permitted to plead (as he could in equity) his avoidance of an anticipated defense.

If defendant pleaded specially the facts relied on by him to meet the "legal effect" pleaded by plaintiff, plaintiff could reply the facts constituting the estoppel, and if the replication was sustained, need not go further.

If defendant pleaded generally, plaintiff had no opportunity to plead the estoppel, because he could not reply specially to a general traverse; therefore he was allowed to prove the facts constituting the estoppel under the declaration.

But, under the new procedure, plaintiff is bound to allege facts. He may allege them according to their legal effect. But to allege of a void judgment that it was duly given is not to plead it according to its legal effect, but precisely the contrary.

The Code provides that failure to prove an allegation in its entire scope and meaning, as distinguished from some particular or particulars only, fatal.

N. Y. Code of Civil Procedure:

"§ 541. Where, however, the allegation to which the proof is directed is unproved, not in particular or particulars only, but in its entire scope and meaning, it is not a case of variance within the last two sections, but a failure of proof."

To allege a valid judgment and prove a void one would be fatal.

But the Code does not authorize a replication for the purpose of setting up an estoppel.

There is no New York authority, so far as we can find, which allows the plaintiff in an action on a judgment at common law to plead the estoppel in the complaint.

The remedy at law is therefore *not* clear.

P. 49. Appellant states that the cases cited by appellee to the effect that it is doubtful if § 532 of the Code applies to pleadings on foreign judgments, related themselves to courts of inferior jurisdiction. Of the five cases decided under § 532 and placed upon our brief, three were decided upon judgments of courts of general jurisdiction, as follows:

McLaughlin *v.* Nichols, 13 Abb. Pr., 244;

on that of Warren County Circuit Court of New Jersey.

Halstead *v.* Black, 17 Abb. Pr., 228;

on that of Common Pleas of Northampton County, Penn., "a court of record."

Horton *v.* Shipherd, 14 Weekly Dig., 453;

of a Circuit Court of a county in Illinois.

All these were brought on judgments of courts of record corresponding to the State District Court which rendered our judgment. The fact may not have been alleged that the courts were of general jurisdiction.

Point IV.—(p. 72). *Relief broader than claim.* Requires no answer.

Point V.—(p. 73.) *No estoppel of record.*

1. (*a.*) *Order simply interlocutory.*

Not so. Wakelee was decided not to be a creditor. He could not renew his proof of debt as under a dismissal in an ordinary action he could renew his action. His only chance lay in appeal from that decree. It was final. Discussed fully heretofore.

(*b.*) (p. 89.) *Validity of judgment not in dispute.*

It was agreed upon.

Mason's Executors *v.* Alston, 9 N. Y., 28, cited by appellant (p. 90) is not an authority. Nobody agreed that the will was valid in execution, but its validity is plainly doubted. Certain defendants preserve their rights in their answer, admitting "that the devise of real and personal estate contained in the said instrument

purporting to be the last will and testament of the said John Mason, *if* said instrument were duly executed and published as such, is nevertheless, as these defendants are advised and believe, utterly null and void, and has no legal effect." This is merely a conditional, but no actual, admission.

Boyd *v.* Alabama, 94 U. S., 645, cited by appellant (p. 93) is not against us. There the constitutionality of the act was neither denied nor asserted. "It was not drawn in question." Here there was asserted and agreed to be "a judgment."

The unconstitutionality of a statute can be so waived as to estop a party from averring it as a defense.

Daniels *v.* Tearney, 102 U. S., 420.
(See our brief, p. 28.)

(*c.*) (p. 95.) *Decision concerning validity of judgment unnecessary.*

Not so. The decree struck out the proof of debt, which could only be done on the ground that something had happened in the course of years to expunge these debts. Their validity had been *res judicata* for years. Of course this means the judgment had taken the place of the debts and it could not do so unless it was a debt itself and valid.

(*d.*) (p. 99.) *A fourth ground for the order. The specification of opposition was too indefinite and too general to raise an issue.*

Not so. Wakelee could then have amended or renewed and proceeded. And no such ground justified striking out the proofs of debt. Clearly the specifications were not considered.

(*D.*) (p. 102.) *Incompetency of evidence of oral arguments.*

Disposed of heretofore. Appellant cannot complain. His own witness, Thompson, swore on the direct to same facts. No objections made by appellee.

(*E.*) (p. 104.) *Decree of res judicata not binding in New York.*

Absurd! It is binding all over the country under the Constitution. The illustration is absurder still. If Wakelee had sued Davis in Pennsylvania upon a California judgment void, because procured upon publication of the summons and without jurisdiction of the person, and the Pennsylvania Court had given an erroneous judgment for Wakelee which Davis had not appealed from, and which was still standing in full force, the Pennsylvania judgment would have merged the California judgment, and Wakelee's lawyer would have sued in New York on the Pennsylvania judgment. This is all elementary.

Point VI.—(p. 107.) *No estoppel in pais.*

This subject has been fully discussed in our first brief.

Incidentally a few sub-points may be noticed.

(*a.*) (p. 109.) *Davis did not assert validity of judgment.*

Under this is cited Ostrander *v.* Campbell, 20 State Rep., 806, holding that pleading a judgment in bar did not estop from appeal therefrom.

This is not an authority against us.

It was decided by the Supreme Court of New York, not by the court of last resort, the Court of Appeals.

This Court is not governed necessarily by the *lex*

fori in questions of general law. The decisions throughout the country are to the contrary of the Ostrander *v.* Campbell case.

See cases cited at page 32 of our first brief.

Also especially

Wills *v.* Kane, 2 Grant's Cases (Pa.), 60.
Ogden *v.* Rowley, 15 Ind., 56.
Martin *v.* Ives, 17 Serg. & R., 364.
Abbott *v.* Wilbur, 22 La. Ann., 368.
Baily *v.* Baily, 44 Pa. St., 274.
Henderson *v.* Staniford, 105 Mass., 504.
Reid *v.* Holmes, 127 Mass., 326.
Foye *v.* Patch, 132 Mass., 105.
Hendrick *v.* Whittemore, 105 Mass., 23.
Penhallow *v.* Doane, 3 Dall., 54, 101, 117.
Warder *v.* Taintor, 4 Watts, 270.
Yaple *v.* Titus, 41 Penn. St., 195, 203.
Evans *v.* Spurgin, 6 Grattan, 107.

(*b.*) (p. 110.) *Davis' representation not of material fact, but of law.*

Not so, as shown. Counsel cites cases. Wilmore *v.* Flack, 96 N. Y., 512, simply holds the trite doctrine that consent cannot confer jurisdiction on an appellate court. *Nor was Davis' mistake honest* as shown, but it was made in fraud.

Kinnier *v.* Kinnier, 45 N. Y., 535, is not parallel. The assertion that a judgment of a sister State was void was there held to be a mere legal conclusion, and not to be pleaded.

But a *denial* that there was a judgment is not a legal conclusion exclusively, but a statement of fact involving such conclusion, just as a statement that there is a judgment is statement of fact involving a legal conclusion. But one statement cannot be rejected without the other. Kinnier *v.* Kinnier has been overruled by this Court in Hanley *v.* Donoghue, 116 U. S., 2, in that a statement in a State Court of a

conclusion of the law of a sister State is a statement of fact.

The case of Whitwell *v.* Winslow, 134 Mass., 343, is in contrast with the following:

Where vendee said to vendor the absence of words "more or less" from description in deed "made no difference," and affirmed to a would-be purchaser that the notes given on purchase were "all right," he was held estopped to set up deficiency of area of farm, although ignorant of deficiency at time of statement.

Swezey *v.* Collins, 40 Iowa, 540.

So, too, where both parties had means of knowing the law, the one who was put off his guard by the other was the innocent party and must not suffer. Here a legal conclusion was adopted, not stated.

Maple *v.* Kussart, 53 Penn., 348.

Austin *v.* Loring, 63 Mo., 19.

(*b.*) (*p.* 123.) *Wakelee had no right to rely upon Davis' statements because ex parte.*

This because Wakelee had elected his remedy, gone voluntarily out of the bankruptcy court and sued at law, and had thus abandoned his standing in the bankruptcy court and was then dismissed.

This is a simply amazing position.

Davis claims that Wakelee's claim on the judgment is barred by the discharge in bankruptcy.

In a case where a creditor had sued before the petition in bankruptcy and had been stayed, and then got leave to proceed with his action and procured judgment, this very Davis procured the New York Court of Appeals to hold that the leave to sue simply took away from the defendant the protection of the statute while he was obtaining his discharge, leaving plaintiff at liberty if he could to obtain judgment and issue execution thereon and enforce payment thereof before discharge obtained, and that the

judgment was still a debt provable in the proceedings and barred when the discharge was granted.

McDonald *v.* Davis, 105 N. Y., 508.

So, too, this Court has held that there was no merger of a provable debt in a judgment recovered thereon pending bankruptcy proceedings; that the debt was the same provable debt. That the owner was still a creditor.

Boynton *v.* Ball, 121 U. S. 457.

Again, Davis says the judgment is void and cannot be collected, yet under this point he says Wakelee had exercised his election of remedies, had gone out of the bankruptcy and was bound by his election, so that he had no standing.

The judgment was void *ab initio*. All the acts of Wakelee in getting it were null. Yet, forsooth, these void proceedings are to be taken as an election of remedies. They cannot be. There was no election by Wakelee till Davis created his estoppels.

(*a.*) (*p.* 127.) *Davis obtained no benefit by the representation.*

He dismissed Wakelee's opposition by force of his representations and obtained his discharge, barring other creditors. Is this no benefit?

The *tu quoque* argument on page 130 is very amusing. Wakelee's "inequitable tactics!" In view of the facts, comment is unnecessary.

(*b.*) (p. 131). *Wakelee suffered no detriment.*

This statement is sought to be sustained as follows:

The record shows no loss of a single dollar to Wakelee resulting from the order (p. 134).

Our answer is that when Wakelee was denied the privilege of disputing Davis' discharge he was in-

jured. Had he succeeded in preventing Davis' discharge he could have sued him on the original debt and collected the money, the judgment being void. If that judgment is still to be held void, Wakelee lost all his rights by reason of Davis' fraudulent representations.

It is needless to answer the remaining points further than as heretofore.

The appellant has carefully avoided in his brief any response to our charge that the election of remedy by and the inconsistency of positions taken by Davis are estoppels *in pais*, as often declared. This has all been shown heretofore.

Such estoppels are founded not upon contract nor any contractual relation, but upon public policy, which does not allow a suitor to play fast and loose with the Court. His representations in pleading may or may not bind him as toward the adverse party; but even if they do not, the case may be such that the Court having been invoked to grant relief upon one aspect of his contention, should, as a matter of sound judicial policy, refuse to allow him to shift his grounds, and present a wholly inconsistent aspect.

Terry *v.* Munger, 121 N. Y., 161.

Respectfully submitted.

ANSON MALTBY.

137-680

EVENING POST JOB PRINTING HOUSE—N. Y.

Office Supreme Court, U. S.
FILED.
JAN 31 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

ERWIN DAVIS,
Appellant,

vs.

ANGELICA WAKELEE,
Appellee.

No. 181.

RESPONSE TO APPELLANT'S MEMORANDUM IN REPLY.

Shortly before the opening of the argument the appellant filed a new brief or memorandum. Permission being given, we responded thereto.

I.—Under Point A of the memorandum are remarks which need no further treatment save as in appellee's brief and answering brief.

There is, however, on page 5 a reassertion in brief of the matter *de hors* the record, which appeared at full length in appellant's first brief on appeal at pages 61 and 72, which by notice of motion filed four days before the argument, I moved to strike from the said brief.

It seems strange that while counsel was, in answer to interrogation from members of the Court, defending his course in printing this extraneous matter in his brief by stating that it was printed not as evidence, but as a precedent, he had

only an hour or two before filed this new brief which reiterated the offensive matter *not as a precedent, but as a fact.*

The words of reiteration are as follows:

"THE COMPLAINANT, WHEN SHE SUED AT LAW, SETS UP *four* SEPARATE CAUSES OF ACTION, ALL UPON THESE DIFFERENT THEORIES, AND ALL OF WHICH WERE PROPERLY PLEADED" (MEMO., P. 5).

Also as follows:

"It seems to us that appellee has waived her "whole position. She does not seem to strenuously "urge any longer that the remedy at law is doubt- "ful, and how can she, when she actually sued at "law by the same attorney and in the very modes "which we in our brief have claimed were proper "modes of suing at law. And yet in the bill in this "case by the same attorney she claims that she "cannot so sue" (Memo., p. 9).

These certainly are not assertions of precedent but of facts.

This new matter should also be stricken out, no previous opportunity being had for a motion thereto.

II.—I have in former briefs sufficiently discussed the matter under Point B in said memorandum and have shown the existence of the estoppels as contended for in our first brief.

III.—Under Point C of said memorandum counsel mistakenly calls my client "the appellant" at the outset, and we object to any confusion of the two parties in matters of morals or facts.

Their arguments on page 12 of their original brief that the judgment is dead, and on page 16 of said brief that the judgment is non-existent because of the discharge in bankruptcy, are renoted on page 6 of the memorandum, and yet deserve no answer save as treated on our original brief.

On page 7 of the memorandum the appellant argues that we have impliedly admitted that a proper complaint could be drawn at law either under the rules of common law or under the Code.

We have done nothing of the sort, but have contended at pages 54 and 55 of our first brief and pages 4 and 5 of our second brief or answer, that the alleging of a void judgment as duly given is not to plead it according to its legal effect, but precisely the contrary.

This argument is equally applicable to what my opponent states was the method of pleading at common law, to wit, that a judgment was entered.

The legal effect is *not* that a judgment was entered, but simply that Davis is estopped from denying that it was.

Our argument is stated in full on pages 4 and 5 of our answer to appellant's points. In addition to these we read on argument from Bliss on Code Pleading, as follows:

"SEC. 152. 1. THE FICTITIOUS PROMISE.

"*It should be borne in mind that fictitious aver-*
"*ments are contrary to the letter, and especially to*
"*the spirit, of the new procedure.* This, the com-
"mon law pleader, who can hardly think of the
"statement of the facts constituting a cause of ac-
"tion except through the formulas and fictions of
"his system, finds it difficult to appreciate. The
"most common fiction is the promise in assumpsit.

* * * * * *

"Is it necessary or proper, under the Code, to
"state this promise or understanding? The ruling
"upon this subject has not been uniform, although
"the *weight of authority favors the negative an-*
"*swer.*"

Appellant has cited a number of cases as to pleading contracts according to their legal effect, and the acts of agents as the acts of their principals.

Bliss on Code Pleading holds that this does not

involve a fiction, but we hold that pleading a judgment as having been recovered when it was not, is a fiction. I quote Bliss as follows:

"SEC. 158. 4. As to pleading matters according "to their legal effect, contracts may be set out *in* "*haec verba* or according to their legal effect.

"The common law rule or statement is that 'a "contract or legal instrument should be stated ac- "cording to its legal effect,' and in such case there "is no variance if the phraseology of the instru- "ment is not the same as that stated in the plead- "ing.

* * * * * *

"*This is not an artificial or technical rule, nor* "*does it involve a fiction;* for in no other way can "an act or paper be described truly when it is not "set out in words. Thus, it is in harmony with "the requirement of the Code that the pleading "shall state the facts, &c., and the permission to "set out a contract in words, or describe it accord- "ing to its legal effect, is still recognized. This "permission is not confined to contracts; in an "action against a principal for a fraud committed "by his agent, it is proper to say that the frauds "were committed by the principal."

We submit this is a complete answer to appellant's points in this respect.

On page 7 of the memorandum appellant objects that I do not mention cases cited by him showing the pleading of estoppels in a declaration is authorized. We have sufficiently answered these cases. They are all decisions in other States than New York.

The New York cases cited by appellant do not in any way trench upon the rule established in Welland Canal Co. *v.* Hathaway, 8 Wend., 481, which is still the law of New York, unaffected by any subsequent decision, and we do not have to go to other States to learn what New York law is.

It is needless to notice any of the further argu-

ments under Point C, except to say that I have abandoned no position taken in my first brief.

The same remarks apply to what appellant calls the "summary" on pages 9 and 10.

Our arguments have been and are strenuous on all points raised by us.

IV.—*The Statute of Limitations does not bar our claim in any respect, and there were no laches on the part of the appellee.*

Under Point D, at page 10 of the memorandum, the appellant claims that the bill should have been dismissed because the claim was stale, and in view of the laches of the appellee.

Our answer to this position is:

1st. That the estoppels pleaded October 31, 1876, related back to the judgment; that these estoppels did not mean that Davis would for the term of six years only be estopped from denying that the judgment was valid, but would be estopped from so denying during the whole statutory period of twenty years during which a valid judgment would not be barred by the Statute of Limitations.

This is logically self-evident.

N. Y. Code Civ. Proc., § 376: "A final judgment or decree for a sum of money, or directing the payment of a sum of money, * * * heretofore or hereafter rendered in a court of record within the United States, or elsewhere, is presumed to be paid and satisfied, after the expiration of twenty years from the time when the party recovering it is first entitled to a mandate to enforce it. This presumption is conclusive." * * *

It follows then that Wakelee can insist upon the estoppels in any action or suit having the judgment of November 18, 1873, for a subject matter, begun prior to November 18, 1893.

This suit was so begun.

2d. The appellant says that these estoppels are analogous to a new promise which is barred by a limitation of six years from the making of the promise.

The difference between the two is that a new promise is a new contract and does not relate back to the old.

3d. Appellant asks dismissal because of our laches.

This claim was first advanced in this suit by appellant's last brief put in the day of argument of this appeal. Neither Court nor counsel ever heard of it before.

While the decisions show dismissals on this ground, they have always been granted by the Court below and sustained on appeal.

Such disposition is discretionary, and each case must stand on its own merits.

If the Court below has not dismissed on this ground, the appellate Court will hardly disturb the decree where the matter was not brought to the attention of the Court below.

Should dismissal be granted by appellate Court it has power to reverse and in meritorious cases give leave to amend and proceed anew. Our case deserves such leave if necessary.

10 Wall, 419.

But the claim is not stale and there were no laches; we had no need of any injunction until after February 5, 1881. Until after his discharge, March 6, 1877, Davis took no step against the validity of of the judgment, after obtaining the order of October 31, 1876.

We show this lack of need in two ways:

FIRST.--Davis, after obtaining his discharge, on the 13th day of April 1877 moved to vacate the judgment to which the estoppels related in the State court wherein it was entered, and on the 10th of

July an order was entered *vacating* the same (Rec., pp. 78 to 82).

This order remained in force nearly four years, until it was reversed on appeal in the Supreme Court of California February 5, 1881 (Rec., p. 86), and by Section 406 of the New York Code of Civil Procedure it is provided that "Where the commencement of an action has been stayed by injunction, or other order of a court or judge, or by statutory prohibition, the time of the continuance of the suit is not a part of the time limited for the commencement of the action."

Certainly the period of four years during which the judgment was vacated and we could bring no action whatsoever upon it is covered by this section, and it is easy to see that the full ten years did not run between October 31, 1876, and the commencement of this suit April 13, 1888, after deducting the period during which the judgment was vacated, to wit, from July 10, 1877, to February 5, 1881.

During this four years we had our remedy at law and were successfully defending Davis' attack on our judgment. An injunction in aid was not necessary and would not have been granted.

SECOND.—We do not for a moment admit that the ten years should be calculated from October 31, 1876, when the order was entered, or March, 1877, when the discharge was granted.

(*A.*) At that time an action was pending in England in which, after receiving his discharge, Davis set up that discharge as a defense April 19, 1877, and Wakelee in reply thereto defended that the judgment in question was valid, and that the claims of the plaintiff in said action were not provable in said defendant's said bankruptcy, nor were they subject to the Bankruptcy Law of the United States in defendant's said bankruptcy, nor were they discharged or released by the said alleged discharge, but were excluded from the operation thereof and were not

affected thereby, so that at that time there was no need of any injunction, as Wakelee by replication could and did set up the estoppels (Record, pp., 88-89).

This action in England was brought upon this judgment and discontinued after the judgment was vacated by the State court of California, so that really the ten years could not have begun to run on any theory until February 5, 1881, when the Supreme Court of California reversed the order effecting the judgment, and between that date and the commencement of this suit we were vigorously suing Davis upon our claim.

We have been in hot litigation for many years and have spared no pains to make Davis pay up, and yet we are met at this late date with the claim of staleness and laches. The record shows diligence on our part, and the utmost merit in our claim, and shows fraud on the part of Davis at every turn.

(*B.*) Again, the right to bring a suit in equity in aid of an action at law is not lost till the right to bring the action at law is lost.

As I have shown, we had the right to bring an action at law at any time within twenty years from the entry of the judgment, and where threats or threatening positions are made and taken by the proposed defendant in an action on such judgment at any time during the twenty years, then we have the right to bring these proceedings.

The evidence in this case shows that Davis, even after this suit had been commenced, before the complaint was amended and before the injunction was granted, had in his counsel's briefs on demurrer (Rep., p. 50) claimed that Davis was not estopped from claiming that said judgment was and is in law utterly void and not valid, because the Court of California had not the jurisdiction to grant the same.

Therefore we had the right at that very time to the injunction which has since been granted to us.

Relief is administered in equity as the nature of the case and the facts as they exist at the close of the litigation demand (Peck *v.* Goodberlett, 109 N. Y., 180); and this threat or claim of Davis was of course made prior to the decree.

If we had begun the action at law prior to bringing this suit, of course we could have brought this suit in aid of the *action at law thereafter*, and it stands to reason that we could bring this suit in aid of a proposed action at law with equal justice.

Apart from the Statutes of Limitations this Court should not be astute to discover any staleness in a claim which the record shows has been prosecuted with such diligence by the complainant Wakelee and her husband in so many courts and countries—in the State court of California, in the Court in Bankruptcy in California, in the courts of England and of France, in the State courts of New York and in the United States Circuit Court of New York.

We have been constantly insisting upon the justice of this claim.

It remains for counsel to hurriedly thrust in such a claim as this an hour before the argument on appeal was commenced, and he does not commend himself to the equity of this Court in making such a claim in view of all the facts.

It is but a part of the wrongful conduct of the appellant as shown through the whole history of the case.

4th. Under (2) at page 15 the appellant says that this Court should dismiss this bill because this suit in equity was barred, not having been commenced within ten years after the cause of action accrued, and further says that this fact appears on the face of the bill, and that appellant demurred. In the United States courts, in equity, the bar of the Statute of Limitations cannot be insisted upon without being pleaded. Ordinarily this pleading can be done by demurrer,

Spiedel *v.* Henrici, 120 U. S., 377;

Rhode Island *v.* Massachusetts, 15 Pet., 233;

and appellant states he has demurred to the bill.

The appellant has no right to rely upon his demurrer as raising the bar of the Statutes of Limitations. The demurrer was overruled and withdrawn as a condition to being allowed to answer (see Decree, Rec., p. 45), and the answer does not set up such a defense.

Again the New York Code of Civil Procedure, which contains the Statute of Limitations, in the same chapter expressly provides: "§ 413. The objection, that the action was not commenced within the time limited, can be taken only by answer."

If not so taken, then the statute is null and inoperative as to the person wishing to avail himself of it.

It is true that the United States courts are not governed in equity by State laws of pleading, but this strikes at the law itself; pleading it in an answer is necessary to its operation.

This point does not seem to have been involved in any of the United States decisions.

It follows that Davis has no right to insist on the statute in default of both demurrer and answer.

This is not a demurrer to the jurisdiction or to a want of cause of action, and the question cannot be raised after the demurrer is withdrawn.

During his argument the counsel for appellant asserted that the granting of the injunction would do the appellee no good in her action at law.

The counsel well knows that when that injunction shall have been placed in evidence in the action at law any court in this land would allow the appellee to prove her estoppels, and, as there is no dispute on the facts, would instruct the jury to give us a verdict.

Counsel also stated that the question of giving a decree for the payment of money to the complainant had been disposed of on the first demurrer. As a

matter of fact the first bill of complaint asks simply for a decree for money, and Judge Coxe overruled the complaint on demurrer, stating that the remedy lay at law.

On amendment of the complaint, however, a prayer for the injunction as granted was made, and a prayer for a general relief was added. This left open to the discretion of the Court the power to grant a decree for money.

Such decree, however, was not granted on the trial of the case, and the complainant did not appeal therefrom.

Whether the Court has now the right to grant a decree for money to the complainant, having acquired jurisdiction for the purposes of the injunction, is a matter for them to decide.

The decree should be affirmed.

Respectfully submitted,

ANSON MALTBY,
Counsel for Appellee.